

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
BRIEF**



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To be argued by  
JUDITH A. GORDON

74-2116

UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

EDWARD L. KIRKLAND and NATHANIEL HAYES, each  
individually and on behalf of all others similarly  
situated,

Plaintiff-Appellees

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES;  
RUSSEL OSWALD, individually and in his capacity as  
Commissioner of the New York State Department of Correct-  
ional Services; THE NEW YORK STATE CIVIL SERVICE COM-  
MISSION; ERSA POSTON, individually and in her capacity  
as President of the New York State Civil Service  
Commission and Civil Service Commissioner; MICHEAL N.  
SCELSI and CHARLES F. STOCKMEISTER, each individually  
and in his capacity as Civil Service Commissioner,

Defendants-Appellants,

-and-

ALBERT M. RIBEIRO and HENRY L. COONS,

Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-X

EDWARD L. KIRKLAND and NATHANIEL HAYES,  
each individually and on behalf of all  
others similarly situated,

Plaintiff-Appellees, :  
v.

-against- :

THE NEW YORK STATE DEPARTMENT OF  
CORRECTIONAL SERVICES; RUSSELL OSWALD,  
individually and in his capacity as  
Commissioner of the New York State  
Department of Correctional Services;  
THE NEW YORK STATE CIVIL SERVICE  
COMMISSION; ERSA POSTON, individually and;  
in her capacity as President of the  
New York State Civil Service Commission  
and Civil Service Commissioner; MICHAEL  
N. SCELSI and CHARLES F. STOCKMEISTER,  
each individually and in his capacity as  
Civil Service Commissioner.

Defendants-Appellants. :

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ALBERT M. RIBEIRO and HENRY L. COONS, : :

Intervenors-Appellants.:

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On Appeal From The United States District  
Court For The Southern District of New York

**BRIEF FOR DEFENDANTS-APPELLANTS**

### Preliminary Statement

Defendants-appellants (hereinafter "defendants") appeal from the Temporary Restraining Orders signed April 10

and 11, 1973 to the extent that said Orders enjoined defendants pendente lite from terminating or otherwise interfering with the provisional appointments of the named plaintiffs-appellees (hereinafter "plaintiffs") and certain members of the alleged class; and from the so-ordered decision of April 1, 1974 and the Order and Decree of July 31, 1974 declaring examination no. 34-944 for the title of Correction Sergeant (Hale) unconstitutional and enjoining any use of the results of that examination in futuro; defining the class of plaintiffs as all Black and Hispanic Correction Officers or provisional Correction Sergeants who failed examination no. 34-944 or who passed but ranked too low to be appointed; directing defendants to develop a new selection procedure for permanent appointments to Correction Sergeant said procedure to be criterion valid insofar as feasible; directing that an "interim" court approved permanent appointment procedure be created and that under said procedure one class member be promoted for every three non-class members promoted until the combined percentage of Blacks and Hispanics in the Correction Sergeant title equals the combined percentage of Blacks and Hispanics in the underlying Correction Officer title; directing that following the administration of the new (final) selection procedure one Black or Hispanic candidate be promoted for

every three white candidates until the combined percentage of Blacks and Hispanics in the Correction Sergeant title equals the combined percentage of Blacks and Hispanics in the Correction Officer title; continuing the provisional appointments of the named plaintiffs and certain members of the class pending the administration either of the interim or final selection procedure; and finding defendant liable to plaintiffs for attorneys fees in an amount to be determined.

Questions Presented

The prima facie case (Point I, infra.):

1. Whether the district court erred in finding that examination no. 34-944 had a disproportionate impact on all "minority" candidates in face of undisputed evidence that it was necessary to compare candidates within facilities rather than across the statewide pool in order to distinguish ethnic from non-ethnic differences and, on the basis of those comparisons, only Black candidates from Ossining performed significantly differently from Whites?
2. Whether the district court erred in requiring defendants to demonstrate the job-relatedness of the entire examination when undisputed evidence from within facility comparisons of subtest means showed that there was no significant difference on the Law subtest for Whites and Blacks

from Ossining.

The job-relatedness of examination no. 34-944  
(Point II, infra):

3. Whether the district court erred in finding that examination no. 34-944 was not content valid when the procedures followed were consistent with established legal and professional standards and when the competences of the individuals chiefly responsible for executing the procedures were demonstrated to the court.

4. Assuming arguendo that the ruling on the content validity issue was correct, did the district court err in not finding examination no. 34-944 was nonetheless job-related in face of evidence showing that the only omissions from the examination were either unimportant or inappropriate for competitive testing.

The definition of the class (Point III, infra):

5. Whether the district court erred in defining the class as all Black and Hispanic Correction Officers or Provisional Correction Sergeants who failed examination no. 34-944 or who passed but ranked too low to be appointed in face of the within facility comparisons which showed that the only candidates not "similarly situated" with Whites were Blacks from Ossining.

The relief provided in the Order and Decree of July 31, 1974 (Point IV, infra).

6. Whether the district court erred as a matter of law and/or abused its discretion in directing defendants to criterion validate the selection procedure for Correction Sergeant insofar as feasible when defendants' constitutional obligation is limited to demonstrating job relatedness and this Court has previously rejected adherence to a particular validation strategy.

7. Whether the district court abused its discretion in refusing defendants' suggestion that candidates appointed from the 34-944 eligible list prior to the July 31st decree and certain provisional Sergeants who were members of the class as defined by the court be granted permanent appointments when the equities favored such appointments and subsequent additional minority appointments were not jeopardized.

8. Once the district court refused defendants' suggestion for certain permanent appointments from the 34-944 eligible list and effectively cancelled that examination, did it err in imposing preferential minority quotas or goals with respect to either or both the interim and the final selection procedures in the absence of any proof of discrimination or disproportionate impact resulting from

Correction Sergeant examinations administered prior to no. 34-944.

9. Assuming arguendo that the district court was correct in imposing preferential minority quotas or goals, did it err in requiring that such preferences continue until "parity" between the Sergeant title and the Correction Officer title was obtained.

10. Whether the district court erred in enjoining defendants from interfering with the provisional appointments of certain members of the class as defined by the court in the absence of any proof that those individuals, were better qualified than either the Whites or other minority individuals.

Additional relief provided in "so ordered" opinion of April 1, 1974 (Point V, infra).

11. Whether the district court erred as a matter of law or abused its discretion in finding defendants' liable for plaintiffs' attorneys' fees on the theory that said attorney acted as private attorneys general when the defendants in the action were public agencies and officers of the State of New York joined only in their official capacities, in the absence of any Title VII claim and in the absence of any proof that the defense was interposed in bad faith.

STATEMENT OF THE CASEA. Prior Proceedings

The instant action was brought pursuant to Title 42 U.S.C. §§1981 and 1983 and their jurisdictional counterparts, 28 U.S.C. §§1333(3) and (4). The complaint filed, April 10, 1973 (A-1),\* sought injunctive and declaratory relief, declaring the "acts, practices and policies" in formulating and administering a competitive, objective type examination for promotion of correction officers employed by the Department of Correctional Services to the position of Correction Sergeant (male) to be violative of rights to equal employment without regard to race; preliminarily and permanently enjoining defendants from acting on the results of any invalidated examination for Correction Sergeant; from making any permanent appointments to Correction Sergeant based on an invalidated examination; from terminating or interfering with certain provisional appointments by reason of permanent appointments to the position of Correction Sergeant, by virtue of an invalidated selection device; and restraining defendants from "unlawfully" discriminating against Black and Hispanic persons (A-22 A-24).

\*Numbers in parentheses preceded by the letter "A" refer to pages of the Appendix to this Court.

The complaint alleged that Black and Hispanic persons in the Correction Sergeant title were under-represented when compared to the total State population and as a reflection of the racial/ethnic breakdown of the inmate population; and that there was a significant disparity between the number of Blacks and Hispanics in the correction officer title, and the correction sergeant position (A-15 A-16). The complaint also alleged that a promotional examination prepared by the New York State Civil Service Commission and administered to candidates for the position of Correction Sergeant (male) [hereafter referred to as Examination No. 34-944] resulted in a passing rate for minorities allegedly one-tenth that of white candidates (A-17). The complaint additionally alleged that the examination was not designed to nor did it measure those qualities necessary to the proper performance of the Correction Sergeant duties; and that the examination had not been criterion-validated nor shown to bear a significant relation to the job (A-18 A-19). Plaintiffs also broadly alleged that Examination No. 34-944 and others previously administered similar to it deterred Black and Hispanic Correction Officers from seeking appointment to the position of Correction Sergeant (A-19).

The complaint further alleged that procedures in the Department of Correctional Services affecting bidding for assignment, and "seniority" rights deterred Black and Hispanic Correction Officers from seeking provisional appointment to the position of Correction Sergeant (A-19).

Finally, the complaint alleged that there were certain irregularities involved in the preparation and grading of Examination 34-944 and that a zone system had operated to perpetuate the so-called "all-white" character of the workforce at all upstate institutions (all those other than Ossining Correctional Facility and Greenhaven Correctional Facility). The so-called irregularities in the process were alleged to be the practice of nepotism, the so-called inordinate length of time taken to grade the examination and the fact that supervisory personnel participated in formulating many questions on the examination (A-19 A-20).

At the same time as the complaint was filed an Order to Show Cause for a Preliminary Injunction and Temporary Restraining Order was issued by the District Court (Jasken, D.J.). The temporary restraining order restrained defendants from

making any permanent appointments to the position of Correction Sergeant or from "terminating or otherwise interfering with the provisional appointments of plaintiffs and other Black or Hispanic Correction Officers"\*\* (A-35 A-36).

On April 11, 1974 the District Court (Lasker, D.J.) clarified the temporary restraining order, and simultaneously extended it to and including April 20, 1973. As clarified, the Court continued its order restraining defendants from making permanent appointments, but permitted defendants to give provisional effect to the permanent appointments scheduled to take effect on April 12, 1973. The defendants were instructed by the Court to reassign its personnel so as not to terminate or otherwise interfere with the provisional appointments of Black and Hispanic Correction Sergeants (A-61 A-68). By stipulation, the parties stipulated to advance the trial on the merits and consolidate it with the hearing on the preliminary injunction. The parties also stipulated to a further extension of the temporary restraining order allowing it to remain in effect until the Court ruled on the merits or on plaintiffs' application for a preliminary injunction (A-69 A-74).

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\*As will be discussed in more detail infra provisional appointments are used to fill vacancies in a title when there is no available eligible list from which to make appointments. These appointments are temporary and terminable at will, no matter how long the incumbents serve, and must be terminated once there is an eligible list from which to make permanent appointments. McKinney's Civ. Serv. L. § 65. McCann v. Kern, 262 App. Div. 109 (1st Dept., 1941), affd. 287 N.Y. 581 (1941); Russell v. Hedges, 470 F. 2d 212 (2d Cir., 1972).

On May 4, defendants moved to dismiss the complaint for improper venue and improper service (C-75 A-76). The Court denied defendants' motion to dismiss or transfer on the basis of improper venue, but recognized that plaintiffs mode of service was inadequate to vest jurisdiction over the natural defendants in their personal capacities. The Court declined to dismiss on that basis as

"...recovery against them individually is virtually inconceivable, personal service on them appears to be unnecessary."

(A-77 A-82)\*.

Subsequently, on June 22, 1974, plaintiffs amended their complaint by alleging that prior examinations for Correction Officer and Correction Sergeant were not significantly related to the positions for which they tested and that they screened out a far higher percentage of Black and Hispanic candidates, and that the present underrepresentation of Black and Hispanic Correction Officers and Sergeants were primarily due to these examinations (C-23 A-31).

Plaintiffs also moved by an undated notice of motion returnable June 25, 1973, for a declaration of a class. The application sought to define the class as (A-84 - A-85):

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\*The opinion of the District Court is reported at 353 F. Supp. 1349.

"a) all those Black and Hispanic persons presently employed by the New York State Department of Correctional Services as permanently appointed Correction Officers (Male) or provisionally appointed Correction Sergeants (Male) who took Examination number 34-944 for permanent appointment to the position of Correction Sergeant (Male) but by virtue of their performance on that examination are not eligible for, or will not be appointed to, the Correction Sergeant position; and

b) all those Black and Hispanic persons employed by the New York State Department of Correctional Services as permanently appointed Correction Officers (Male), who, as a result of defendants' policy and practice of determining promotions to the Correction Sergeant position on the basis of a written examination of the nature of Civil Service Examination Number 34-944 have been or may be deterred from seeking promotions"\*

On July 10, 1973, a verified answer was filed putting certain claims in issue and setting forth eleven affirmative defenses, including the legitimacy and standing in the action of the corporate plaintiff -- Brotherhood of New York State Correction Officers, Inc., that the examination was a validated one under appropriate professional standards; that the examination was, in fact, job-related; the Court lacked subject-matter jurisdiction; that the Court should defer to the Equal Employment Opportunity Commission; that the complaint or several portions thereof fail

\*Because of the factual issues created by defendants response, the District Court deferred consideration of this issue until the trial.

to state a claim for which relief can be granted; that the Court lacks jurisdiction of defendants in other than their official capacity; with regard to prior correction sergeant examinations, any inquiry is barred by the statute of limitations and laches; and lack of standing (A.86 A.97).

On July 19 and 20, the parties filed their respective pre-trial specifications (A-99 A-122) and trial was commenced on July 24, 1973, continuing to July 30, with decision at the close of trial, reserved by the Court (A-1232, T. 995).

Subsequent thereto both sides filed extensive post-trial memoranda and plaintiffs submitted their proposed findings of fact and conclusions of law.

On April 1, 1974, the District court rendered its "so ordered" opinion\* in which it held that plaintiffs had established their prima facie case (See Point I, infra) and that defendants had failed to sustain their heavy burden of showing the examination to be job related or validated (See Point II, infra). The Court further held that plaintiffs were entitled to a limited class action determination (See Point III, infra) and to attorneys' fees (See Point V, infra) (A-148 et seq.). Upon these findings, the District Court, "so ordered" (A-196):

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\*This decision is reported in 374 F. Supp. 1361.

"Examination 34-944 is declared unconstitutional and is set aside. Defendants are enjoined from making permanent appointments to the position of Correction Sergeant from the eligible list on which it is based and from terminating the provisional appointments to class members solely because of their failure to pass the examination."

On April 21, 1974, the Court (Lasker, D.J.) signed an order to show cause why two intervenors, Albert M. Ribeiro and Henry L. Coons, should not be permitted to intervene on behalf of themselves and a class of "all persons presently employed by the New York State Department of Correctional Services who participated in Examination No. 34-944 for permanent appointment to the position of Correction Sergeant (male) and by virtue of their performance on that examination were eligible and received promotion to the position of Correction Sergeant (male) in reliance upon notices received from the Department of Correctional Services and all other persons who participated in said examination and who, by virtue of their performance on that examination were eligible for promotion to the position of Correction Sergeant (male) when reached on the eligible list" (A-202 et seq.)

On July 15, 1974 the Court granted intervenors' motion to intervene but limited their intervention so as not to permit them to relitigate issues already resolved in the District Court. Specifically, the motion to intervene prohibited intervenors from relitigating the ethnic impact of the examination; the job-relatedness or non-job-relatedness of the examination; whether the examination has been shown to have a significant degree of job-relatedness for any class of persons, whether the performance of intervenors or any other class of persons on the examination is indicative of his qualification for the Sergeant position; whether the definition of plaintiffs' class is appropriate; and finally whether promotions assuring an appropriate ratio of plaintiff class members is an appropriate remedy. The Court, however, denied intervenors' application for a class action determination (A-230-231).

Previously, because of the "so ordered" nature of the District Court's opinion, defendants filed a timely notice of appeal (A-239-240).

Finally, on July 31, 1974, the District Court issued a final order and decree, from which an appeal has been taken to this Court, by defendants and intervenors (A-246, 247). The decree (A 241 et seq.) reiterated the declaration of unconstitutionality of the examination. In addition, the Court enjoined the making of permanent or provisional appointments based on the results of the examination or administering or promulgating eligible lists based on the examination. The Court further mandated that defendants develop in accordance with guidelines established by the Court, a "lawful non-discriminatory selection device for the position". The guidelines to which defendants were to adhere are:

- (a) The new selection procedure be developed within the shortest practicable period;
- (b) The new selection procedure must be validated in accordance with the EEOC Guidelines on Employment Selection Procedures;
- (c) All validation procedures shall be performed by means of empirical, criterion-related validation techniques insofar as feasible; and
- (d) The selection procedure may include a written examination and other selection devices.

The Court also established the raw outlines for an interim selection procedure for permanent appointment to the position of correction sergeant. The order allows defendants to make requests to the Court for permanent appointments to the position of correction sergeant upon a showing to the District Court, the circumstances that render such appointments necessary or desirable; the number of and proposed effective date of such appointments; the nature of the selection procedure, the reasons therefor, the reasons "assuring that the procedure will be based on merit and fitness and will be non-discriminatory in effect"; that members of plaintiffs' class shall receive at least one of every four promotions made until parity is established with the underlying title; and that copies of the request shall be submitted to plaintiffs' counsel or other designee for comment.

The order and decree also mandated that even after the validated selection device is created, defendants must appoint one Black or Hispanic for each three non-minority candidates until parity with the underlying correction officer title is reached.

B. The Development of Examination 34-944

The development of examination 34-944 began with the exhaustion of the then existing eligible list for Correction Sergeant (male). At the time the eligible list from the 1970 examination was exhausted, the personnel office of the Department of Correctional Services notified the Civil Service Department of the fact, and the processes were set in motion by which a new examination would be created.

The first step was a scope conference attended by representatives of the operating department and civil service. At this conference, a tentative decision was reached concerning the training and experience requirement and the subject matters of the examination (T. 527-533 A. 763-769). At the conclusion of the scope conference a tentative announcement, reviewing the decisions made there, is prepared and circulated to the operating agency for comment and review. In this case, the tentative announcement was reviewed by Deputy Commissioner of Correctional Services Quick (T. 440, A. 676). Commissioner Quick started in the Department as a correction officer and went up through the ranks, serving as a sergeant and lieutenant, and was, as a

result, intimately familiar with the duties, the experience requirements and the policies of the department regarding first-line supervisors. He testified that while he disagreed with the six-month experience requirement originally proposed,\* he did feel, based on his experience and knowledge in the corrections field that the scope was appropriate.\*\* (T. 453, 460-464; A. 639, 696-700).

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\* See Pliffs. Exh. 9 (A. 1337-8).

\*\* The Commissioner explained that he was unhappy with the six-month experience requirement because it was too brief a period for a correction officer to even become a good correction officer, to have the necessary exposure to the corrections system, or to even act effectively as a correction officer (T. 453; A. 639). He approved the ultimate requirement (2 years to take, 3 years to be appointed) because of the rapid expansion of the Department and a great many minority group officers who would have otherwise been unqualified to take the examination (T. 456, A. 692). In so doing, he noted that for a man with only three years service to be appointed, he would have to be highly motivated to place high enough to be appointed (Id.). The Commissioner was, on the other hand, satisfied with the subject matter proposed, in all respects, noting that each proposed subtest was both necessary and germane to the duties of the position.

Prior to the scope conference (and during the entire examination preparation process), the examiner in charge of preparing the test, familiarized himself with the position through consultation of the job specifications, visited to several correctional facilities (Coxsackie, Auburn and Ossining) where he observed the performance of the duties of the Correction Sergeant, a visit to the Training Academy, a study of the job audit for the correctional series (DXE A. 1516-1695) and studies of the laws, rules and regulations of the Department, as well as the employee rule book (DXO) and numerous other materials on corrections work (T. 519, 521, 530, 546, et seq.; A. 755, 757, 766, 782, et seq.)

After the tentative announcement was approved by both departments, the actual construction of the examination items began. The cross-occupational skills group was requested to prepare items on the report preparation and supervision sub-tests.\* (PX 8, A. 1335-6).

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\* The cross-occupational skills group (or T-1 group) consists of specialists in the preparing items for sub-tests that measure knowledge, skills and ability present in many titles. The vitae of the two examiners who prepared the supervision and report preparation sub-tests (Kate Tang and John Decker as well as their chief, Norma Kunofsky) are annexed in Appendix I. The report preparation sub-test is contained in PX 18, items [questions] 46-60 (A. 1363-1367); the supervision subtest is also contained in PX 18, items 31-45 (A. 1360-1362). The other subtests are laws (PX 18, items 1-15, A. 1356-1358); modern correctional practices (PX 18, items 16-30, A. 1358-1360) and judgment (PX 19, items 1-15, A. 1369-1371).

For the construction of the remaining three subtests: laws, rules and regulations; modern correctional practices; and judgment (PX 8 A. 1332-4), civil service asked correctional services to supply line officers as experts in these fields. The Department chose three Correction Lieutenants, all of whom were awaiting promotion to Captain -- Lt. Hy Sperbeck, Lt. William Ciuros and Lt. David Harris (T. 549, A. 896). At the first meeting between the line officers and civil service, a discussion was held concerning the job itself, the types of things that were important and what should be tested for. (T. 550, A. 797). The corrections people were then instructed to prepare questions based on their experiences, what they thought was important and based on problems they had had.

At subsequent meetings, the group would look at each proposed question and decide whether or not it was relevant, whether it should be used, whether it was too easy or too hard, or whether it was more appropriate for a higher level (T. 552, A. 899).

Simultaneously with the development of the items the K, S, and A statements, which describe the general format and the content of a particular subtest, were developed.

Shortly before the examination was administered, Lieutenant Sperbeck reviewed all the items in the three

sub-tests he had participated in preparing (T. 749 A. 985). Then, on October 14, 1972, examination 34-944 was administered state-wide to 1441 correction officers.\*

After the examination was administered the Civil Service Department held the first of two reviews. At the first review candidates were given an opportunity to challenge the proposed key answers on the ground that other answers were as good as or better than the proposed key. As a result of the appeals two items were multiple keyed. Thereafter, the examination was scored and a meeting was held to choose a passpoint. The passpoint was set at the maximum permitted under law, 53 items or 70% of the test, as it was felt, based on past practice that there were a sufficient number passing the examination at this score to meet the needs of the Department of Correctional Services for the next two years. Thereafter, the eligible list was established, after adjustments in position of passers were made for seniority and veterans credit (T. 382 A. 618). The eligible list, as finally promulgated, was certified to the Department of Correctional Services, and appointments were made therefrom.\*\*

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\* As the District Court noted, the statistics (PX-12) (A. 1343-8) indicate only the performance of 1383 candidates due to the absence of ethnic data on the remaining candidates. (A. 197).  
\*\* See, *supra* pp. 9-11.

The second, "computational", review was held shortly after the action was commenced wherein candidates were given an opportunity to check the score they received on the examination (T. 273-4 A. 510 A. 511).

Subsequent to the institution of this action Commissioner Preiser and Deputy Commissioner Quick met to review the examination in order to determine what position the Department of Correctional Services would take with regard to it. After reviewing the examination, both men found it sufficiently job-related to be a fair measure of the knowledges, skills and abilities needed to perform the duties of a correction sergeant (male). (T. 486, A. 722). In reviewing the examination:

"the commissioner took a great deal of time in looking it over himself and asking a lot of pointed questions, and at the end he complimented...[the examiners] on what he thought was a good examination in his opinion."

#### C. The Trial

Pursuant to Rule 65(a)(2), Fed. R. Civ. Pro., the trial of the merits in this action was advanced and consolidated with the hearing on the preliminary injunction. See p. 10, supra.

Prior to the actual commencement of the taking of testimony, plaintiffs withdrew any claim they had against the

validity or disparate racial/ethnic impact of the underlying correction officers examinations and plaintiff Brotherhood of New York State Correction Officers, Inc., withdrew as a party (T. 7-8, A. 254-255).

Plaintiffs' evidence on their case in chief consisted largely of raw statistical data unaccompanied by any expert testimony concerning its meaning and whether any disparities were statistically significant. The data produced and summarized by them (PX. 12, 28, 29, 30, 31, 32, 33, 34 and 35, A. 1343-1347, 1436-1451), showed total racial/ethnic performance on the examination. Plaintiffs, as more fully set forth in Point I, infra, did not attempt to compare white-black, white-hispanic performance on a facility by facility basis, even though this information was available to them.

The testimony adduced at trial consisted mostly of self-serving testimony by plaintiffs and others who would apparently benefit from a judgment for plaintiff, on their assessment of their ability to perform the duties of a correction sergeant, and their assessment of the examination which, with one exception (Young), they each failed. In addition, plaintiffs called Deputy Superintendent Gerard Ryder, of Ossining Correctional Facility, who testified as to his

assessment of plaintiffs' ability to act as sergeants, and what the duties of a sergeant were. Lastly, plaintiffs called Samuel Taylor, a chief personnel examiner of the Department of Civil Service (T. 317, A. 554), who testified to his understanding and assessment of the APA Standards and the EEOC Guidelines, their utility and the extent to which examination 34-944 complied with the guidelines.

Defendants case in opposition consisted of testimony from a Deputy Commissioner of Correctional Services outlining his role in the preparation of the examination, his qualifications as a subject-matter expert in the correction field, particularly with regard to the duties of a sergeant as well as his and Commissioner Preiser's evaluation of examination 34-944. In addition, defendants called examiner Kenneth Siegel and Captain Nyland Sperbeck from Corrections who described their roles in the preparation and administration of examination 34-944. Mr. Siegel also testified to statistical analyses conducted with regard to the examination both on a state-wide and facility-by-facility basis and on a total test and subtest basis. Finally, defendants introduced the testimony of Dr. Erwin K. Taylor, Chairman of the Board, Director of Research and founder of the Personnel Research and Development Corporation and former President of Division 14 of the

American Psychological Association,\* publishers of the "APA Standards" PX 26 (A. 1407-1439). Dr. Taylor testified to his opinion as to the adequacy of the procedures followed by the Departments of Correctional Services and Civil Service in the creation of the examination, reaching the conclusion that while he could not state that the examination was content valid, the procedures testified to by Messrs. Siegel, Sperbeck and Quick would generate a content valid examination.

In rebuttal, plaintiffs called their expert witness Dr. Richard S. Barrett, a Professor of management science at the Stevens Institute of Technology.

Dr. Barrett's testimony consisted largely of a graphic description of what a scatter plot of an examination should look like, with one axis representing successful job performance and the other the test score. The expert also defined what he meant by a content valid selection device.

After testifying to generalities, Dr. Barrett attempted to analyze examination 34-944, but declined to testify whether the examination was or was not content valid

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\* Dr. Taylor's complete vita, as well plaintiffs' expert witness, Dr. Richard S. Barrett, were submitted in evidence and are PX 24 (A. 1398-1401) and DXEE (A. 1935-1393).

but expressed doubts about its content validity.

Dr. Barrett then engaged in criticism both as a tester and as a self-styled subject-matter expert on various items on the examination, criticizing them for triviality, obviousness of the answer, disagreement with the key answer, inappropriate stems, and testwiseness.

At the close of Dr. Barrett's testimony, both sides rested, and decision was reserved.\*

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\* This necessarily brief summary of the course of the trial is not intended to be an exhaustive analysis of the testimony on the issues. The Court is respectfully referred to Points I, II and IV, infra, where the testimony and facts on the issues before the District Court are discussed in more detail.

POINT I

THE DISTRICT COURT ERRED AS A MATTER OF LAW AND FACT IN FINDING THAT A PRIMA FACIE CASE HAD BEEN ESTABLISHED AS TO ALL "MINORITY" CANDIDATES IN EXAMINATION NO. 34-944 AND AS TO THE EXAMINATION IN ITS ENTIRETY.

In order to establish a prima facie case, plaintiffs were obliged to show through competent proof that examination no. 34-944 had a substantial and adverse "disproportionate impact" on an identifiable racial minority. Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Comm'n. ("Vulcan"), 490 F. 2d 387, 391 and n. 4 (2d Cir., 1973), aff'g. in part and remanding in part, 360 F. Supp. 1265 (S.D.N.Y., 1973); Bridgeport Guardians, Inc. v. Bridgeport Civil Service ("Guardians"), 482 F. 2d 1333, 1335-1337 (2d Cir., 1973) aff'g. in part and revg. in part 354 F. Supp. 778, 783 (D. Conn., 1973); Chance v. Board of Examiners, "(Chance") 458 F. 2d 1167, 1175 aff'g. 330 F. Supp. 203, 223, (S.D.N.Y., 1971); Castro v. Beecher, ("Castro"), 459 F. 2d 725, 732, 734-735 (1st Cir., 1972). See Griggs v. Duke Power Co., 401 U.S. 424, 429-433 (1971).

"Disproportionate impact" may be properly demonstrated by statistical comparisons of candidate performance on a particular examination where, as herein, the size of candidate pool, or pools, is sufficient to permit reliable findings. Vulcan, 360 F. Supp. at 1271. See district court opinion pp. 6-16, A. 154-64.

In support of their prima facie case, plaintiffs offered only arithmetic comparisons of the passing rates of Whites, Blacks and Hispanics in the statewide candidate pool. (T. 13, 99-100, A. 260, 346-47; Plfts. Ex. 12, A. 1343-48; Plfts. Ex. 33, A. 1449; Plfts. Ex. 34, A. 1450). Defendants offered within facility comparisons of White, Black and Hispanic performance by total test mean scores and subtest mean scores (Defts. Ex. DXDD; A. 1934) in addition to passing rate comparisons in the statewide pool (T. 500-501, A. 736-737). Each of the defendants' comparisons was offered with the related statement of whether the differences appearing on the face of the comparisons were statistically significant,\* (T. 501, 509, 510, 511, 515, A. 737, 745, 746, 747, 751 and Defts. Ex. DD, A. 1934), and substantial in terms of disproportionate impact, if any. Chance, 330 F. Supp. at 211, 212, 223.\*\* "Two-tail" t tests and  $\chi^2$  (chi squares) standard statistical methods, were used to determine significance (T. 517, A. 753). Chance, 330 F. Supp. at 211-212.

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\* A relationship or event is considered "statistically significant" if the odds that it would occur by chance are 5 in 100 or less. (T. 512-13, A. 748-49; T. 516-17, A. 752-53; T. 935-36, A. 1173-74. The use of the term "significance" or "significant" in this brief refers to this statistical assessment of probabilities unless otherwise appears from the text.

\*\* Statistically significant differences are not necessarily substantial differences. However, in this case, once the differences in the statewide passing rates were determined to be significant, the ratios show that the differences were substantial under established law. Chance, supra.

On the basis of the within facility comparisons, defendants demonstrated to the district court that examination no. 34-944 had substantial impact on only one candidate group, Ossining Blacks, not on Blacks and Hispanic candidates generally (T. 509, A. 745; T. 510, A. 746; T. 511, A. 747; T. 515, A. 751) and that the law subtest did not affect the Ossining Blacks (T. 510, A. 746; Defts. Ex. DD, A. 1934). Accordingly, the correct legal result in terms of the prima facie case was that Ossining Blacks were the only "minority" that could support a showing of disproportionate impact resulting from examination no. 34-944; that their showing did not shift to defendants the burden of demonstrating the job-relatedness of the law subtest; and that the definition of the class and any award of affirmative relief necessarily should have been limited to them. Compare dicta in district court opinion p. 14, A. 162 questioning the relevance of defendants' attack on the prima facie case. In rejecting this result, the district court was "clearly erroneous" on both the law and facts. Vulcan, 490 F. 2d at 391.

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\* In so stating, defendants do not contend that if they were obliged to demonstrate the job-relatedness of the other four subtests and failed, appropriate relief would take the form of regrading the "examination" on the basis of the "surviving" law subtest, Vulcan, 490 F. 2d at 393-394. Defendants' point is rather that their obligation to prove job-relatedness at trial should match the actual scope of plaintiff's prima facie case. See discussion at Subpoint B, infra.

A. The district court should have relied on defendants' within facility passing rate comparisons in preference to comparisons in the statewide pool.

Plaintiffs entire prima facie case of disproportionate impact from examination no. 34-944 consisted of their division of the entire statewide candidate pool into White, Black and Hispanic "ethnic" groups and an arithmetic comparison of the passing rates of those groups. (T. 13, A. 210; T. 99-100, A. 346-47; Plfts. Ex. 12, A. 1343-48; Plfts. Ex. 33, A. 1449; Plfts. Ex. 34, A. 1450). The passing percentages of the groups were as follows: 30.9% of the White candidates; 7.7% of the Black candidates; and 12.5% of the Hispanic candidates. On the basis of those percentages, Whites passed at approximately four times the rate of Blacks and two and one-half times the rate of Hispanics. District court opinion p. 6, A. 154.\*

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\* Plaintiffs rested their case without offering any evidence on the question of whether the arithmetic differences between White/Black and White/Hispanic rates were statistically significant. Their omission in this regard amounts to a failure of proof on their prima facie case even if the statewide pool is considered the most appropriate level for comparison. Commonwealth of Pennsylvania v. O'Neill, 473 F. 2d 1029, 1031 (3rd Cir. 1973) aff'd. in part, vacating in part and remanding in part, 348 F. Supp. 1084 (E.D. Penn., 1972). However, on defendants' case, Mr. Siegal testified, on the basis of  $\chi^2$  (chi square) tests, that the differences between W/B and W/H passing rates in the statewide pool were in fact statistically significant (T. 500, A. 736). Thus defendants did not pursue this deficiency in plaintiffs' case but focused instead on whether statewide passing rates or within facility passing rates should be preferred.

Defendants' within facility passing rate comparisons showed that the difference in passing rates between Whites and Blacks at Ossining, the facility with the largest concentration of Black candidates (82 out of 104)\* was significant and substantial; that the difference between Whites and Blacks at Green Haven, the facility with the next largest concentration of Black candidates (8 out of 104) was not significant; and that the difference between Whites and Blacks at "other facilities" (14 out of 104) was not significant.\*\* (T. 511, A. 747; T. 515, A. 751 and Plfts Ex. 12, A. 1343-44; Defts. Ex. DD, A. 1934).

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\* Computations were made initially on the basis of 103 Black candidates with 81 at Ossining. At the outset of trial, it came to defendants' attention that one Black candidate had been erroneously reported as White, and the computer display was corrected to reflect the one additional Black at Ossining. See Plfts. Ex. 12 at Code 1007, A. 1343-44. The district court and parties treated all arithmetic and statistical comparisons for the 103 Black candidates as equally applicable to the 104.

\*\* The "other facilities" group (excluding Ossining and Green Haven) was designated by Mr. Siegal to enable comparisons for Black and Hispanic candidates who were distributed so thinly throughout the balance of state correctional facilities that they could not be considered statistically without aggregation and as a control on his other calculations. (T. 513-15, A. 749-51).

With respect to Hispanic candidates, defendants showed that difference in passing rates between Whites and Hispanics at Ossining, the facility with the highest concentration of Hispanics (9 out of 16) was not significant and that the difference in the passing rates for Whites and Hispanics (6 out of 16) at "other facilities" was not significant.\* (T. 510, A. 746; Plfts. Ex. 12, A. 1345-46; Defts. Ex. DD, A. 1934).

Plaintiffs did not offer any evidence to dispute either the appropriateness of defendants' statistical methods or the conclusions of significance and non-significance drawn therefrom.

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\* W/H passing rates at Green Haven were not computed because there was only one Hispanic candidate (Plfts. Ex. 12, Code 1008, A. 1345-46; Defts. Ex. DD., A. 1934). The W/H passing rate comparison for "other facilities" was inadvertently omitted from Mr. Siegal's testimony, but was offered in Defendant's Post-Trial Memorandum, p. 1-8. Defendant's Ex. DD, A. 1934 (3rd Column, 3rd set from top), shows that there were no significant differences between W/H performance at "other facilities" on total test means and subtest means. If the passing rate comparison is calculated, it shows no significant differences as well. Plaintiffs did not except to this addition to the record.

The record reflects only brief comment by Dr. Richard Barrett, plaintiffs' expert, to the effect that when small samples are compared differences must be larger to show significance.

(T. 936-37, A. 1174-75).\* However, "t" test and  $\chi^2$  (chi square) methods used in support of defendants' comparisons take "small" sample size into account have been accepted as suitable for this purpose. See e.g., Chance 330 F. Supp. at 209-214.\*\*

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\* In so stating, defendants are perhaps attributing a meaning to Dr. Barrett which he did not intend. Dr. Barrett was asked: "...[W]hat is the likelihood of obtaining significant correlations given samples of (9, 8, 14 or 16)]." (Emphasis added). He answered: "Rather small unless there is a tremendous difference between the two groups." (T. 936-37, A. 1174-75). However, the comparisons offered by Mr. Siegal were not correlations which compare two or more variables within the same sample, but "t" tests and  $\chi^2$  (chi squares) which compare a single variable between different samples.

\*\* In Chance, Judge Mansfield was confronted with the problem of determining at what point sample size ("N") becomes too small to permit confidence in statistical analysis. Judge Mansfield found that no "meaningful conclusions" could be drawn about differences in candidate performance for 41 out of 50 examinations taken by "very few" candidates; i.e. 83 "minority" candidates over 41 separate examinations. 330 F. Supp. at 212. He accepted as "meaningful" for statistical purposes "9 examinations taken by 10 or more Black and Puerto Rican candidates" and "6 examinations which were taken by a minimum of 18 candidates [from the White group and from the 'minority' group]" 330 F. Supp. supra at 212-13. It is apparent that the N's rejected by Judge Mansfield were 1's, 2's and 3's and not 9's (Hispanics at Ossining) or 8's (Blacks at Green Haven) or 6's (Hispanics at "other facilities") (Defts. Ex. DD, A. 1934), the last group constituting the smallest "N" compared by Mr. Siegal. Moreover, Judge Lasker's own comparisons of passing rates and mean scores use N's of 14 (Blacks at other facilities) 9 (Hispanics at Ossining) 8 (Blacks at Green Haven), and 16 (Hispanics in the statewide pool). District Court opinion, pp. 10, 11, 12 A. 158, 159, 160. The only N he considers as of doubtful reliability in his own calculations is N 6 (Hispanics at "other facilities"). District court opinion pp. 11, 12, A. 159, 160.

The district court's rejection of defendants' within facility passing rate comparisons and preference for statewide pool comparisons rests on two grounds: First, that defendants analysis is legally irrelevant because it attempts to "explain" ethnic differences in performance in terms of such factors or variables as education and cultural deprivation; and second, that defendants' analysis is premised on assumptions which their own statistics show to be factually erroneous (district court opinion pp. 9-10, 10-13, A. 157-58, 158-161).

The district court's "clear error" on the first ground lies in its failure to perceive that defendants' analysis answers the question of what ethnic differences resulted from examination no. 34-944, if any, not why such differences arose. In terms of the Guardians opinion relied upon by the district court, defendants' analysis "alters" but does not "explain" the difference in passing rates, i.e., it determines whether there is a de facto racial classification resulting from the examination and not why such classification exists, if indeed one does. Guardians, 354 F. Supp. at 785, 786; district court opinion pp. 13, 14. A. 161-62. With respect to the second ground, the district court's "clear error" lies in the simple fact that its analysis of the data is wrong. Comparisons which the court labels as "significant" are not in fact significant, and patterns in passing rates and in total mean scores which the court characterizes as reinforcing plaintiffs' allegations

of statewide impact do not in fact do so. (See district court opinion pp. 10-13, A. 158-161).

Both plaintiffs' and defendants' comparisons are based on examination of the computer display of candidate performance on examination no. 34-944 (Plts. Ex. 12, A. 1343-48) prepared by defendants during the course of discovery.\* Plaintiffs examined the statewide pool in terms of the passing rates of the participating ethnic groups and concluded therefrom that all differences appearing on the face of the comparisons were ethnic differences and thus illustrative of the disproportionate impact of the examination. Their conclusion necessarily assumes that all variables affecting test performance other than ethnicity are distributed uniformly throughout the statewide pool, i.e. that observed differences are in reality ethnic differences since all other variables affecting test performance are "equal". However, inspection of the computer display discloses two additional facts which refute plaintiffs' assumption: First, there are differences in White performance, the

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\* The computer display (Plts. Ex. 12, A. 1343-48) consists of separate print-outs for each ethnic group in examination no. 34-944. The lower portion of the print-outs shows the mean scores and standard deviation for the ethnic group as a whole and at each facility within the Department of Correctional Services; Ossining is Code 1007, Green Haven is Code 1008, etc. The body of the print-outs shows the distribution of candidate scores within each facility.

standard of comparison, from facility to facility and in particular Whites at Ossining perform less well than Whites at other facilities; and second, the largest concentration of Blacks and Hispanics is at Ossining with the poorer performing Whites Plfts. Ex. 12, A. 1343-44, 1347-48.\* From these two observed differences, it is apparent that at least one non-ethnic variable, candidate's facility assignment ("facility effect"), is reflected in test performance, and that it is not distributed uniformly among the ethnic groups. Accordingly, the assumption that the statewide pool comparisons are demonstrating ethnic differences was in error; such comparisons demonstrated either ethnic differences or facility effect or both.\*\* This finding in turn makes it necessary to screen out the irrelevant variable through further analysis in order to obtain as "true" a picture of ethnic difference on the examination as the state of

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\* Further statistical analysis by Mr. Siegal shows that White inter-facility differences, particularly with respect to Ossining and other facilities, are significant. T. 502-503, A. 738-39.

\*\* That a non-ethnic variable can substantially affect comparative passing rates among ethnic groups if it is not distributed uniformly throughout the candidate pool may be illustrated as follows:

	Passing Rates	
	Whites	Blacks
Facility X	5.7	5.7
Facility Y	22.3	22.3
Other facilities with Blacks	32.0	32.0
Other facilities with Whites but not Blacks	34.0	

(footnote continued on following page)

the art permits\* T. 502-504, A. 738-40, T. 706-709, A. 942-45.

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(Footnote continued from preceding page)

In the above example, there is a strong "facility effect" in that the passing rates at the different facility groupings are widely divergent. However, the passing rates of Blacks and Whites at each facility are identical, and therefore there is no ethnic difference on the test.

If we then assume that the ethnic groups are not distributed uniformly throughout the different facilities as illustrated by the following chart:

	<u>Proportions ethnic groups found at each location</u>	
	<u>Whites</u>	<u>Blacks</u>
Facility X	.05	.8
Facility Y	.05	.1
Facility with Blacks	.5	.1
Facility without Blacks	.4	0

The overall passing rates for Whites would be 31% and for Blacks 10%. In this situation there is the appearance of gross ethnic differences in passing rates, but it is clear that all of the difference is a result of facility effect and non-uniform distribution of the ethnic groups. See testimony of Kenneth Siegal and comments of Lasker, D. J. at T. 706-709, A. 942-45.

\* This obligation should properly be undertaken by plaintiffs as part of their prima facie case since it answers the question of whether the examination, as opposed to some other factor which has not been challenged, has had a disproportionate impact. However, since plaintiffs failed to proceed in this regard, defendants undertook the further analysis to screen out the facility effect variable.

That facility effect is a non-ethnic variable and therefore properly "screened out" of comparisons of ethnic groups is demonstrated by the fact that it affects White, Black and Hispanic candidates alike, i.e. all ethnic groups who are assigned to certain facilities perform less well than the same ethnic groups at other facilities. It is the uneven distribution of the ethnic groups that affects the statewide pool. This distribution is the result of accident or employee choice and does not correlate with any variable that can be used to distinguish one ethnic group from another. In contrast, variables such as quality of education and cultural deprivation, to which the district court analogized, are actually ethnically related variables since they disadvantage only "minorities" in comparison to Whites. Vulcan, 360 F. Supp. at 1272; Guardians, 354 F. Supp. at 785-786. The "ethnic" quality of such variables and thus the appropriateness of subsuming them within comparisons of test performance of ethnic groups is made clear in the material between the two Guardians quotations used by Judge Lasker below (opinion pp. 13-14, A. 162-163).

Even if defendants' evidence could establish that this difference [in passing rates] is due in large part to the quality of schooling, a prima facie showing of discrimination would nonetheless remain if a test is used that significantly separates applicants [racially] by any factor, including poor quality schooling, and race or ethnic origin correlate highly with this factor.\*\*\* [I]f members of a minority group score significantly less well than others, then even if this result stems from the poor schooling many of them received, the burden shifts to the employer to provide some adequate justification for the test. (Guardians, 354 F. Supp. at 785, 786).

Nothing in the Guardians opinion nor the related decisions even suggests that a neutral variable such as involved herein should be permitted to lend an enhancing effect to the passing rate comparisons. Accord, Rios, v. Enterprise Association Steamfitters Local 638, 501 F. 2d 622 (2d Cir., 1974).

Since within facility comparisons and only those comparisons screen out the irrelevant facility effect variable, defendants proceeded with such comparisons in order to determine the extent of the ethnic difference resulting from examination no. 34-944, if any. As noted, the only comparison which showed statistical significance at the pass-point level was White/Black at Ossining.\* None of the other within facility pass-point comparisons were statistically significant, i.e. White/Hispanic at Ossining, White/Black at "other facilities", White/Hispanic at "other facilities".\*\* Each conclusion of significance and non-significance was based on the application of concededly appropriate statistical methods. See discussion and references pp. 29, 33-34 ante.

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\* Passpoint comparisons were relied upon exclusively by the plaintiffs and considered most appropriate by the court because passing score determines a candidate's eligibility for appointment. District court opinion pp. 11, 16, A. 159, 164. Defendants do not dispute this proposition, but did provide the court with additional comparisons of total test and subtest mean scores. Reference to the subtest mean scores shows which subtest on the examination, if any, are generating significant ethnic differences and thus must be shown to be job-related on defendants' case. See Subpoint B post.

\*\* As noted the W/H comparison for "other facilities" was inadver-

(footnote continued on following page)

Judge Lasker accepted defendants' proof that the "disparity in passing rates between Whites and Blacks at Ossining is statistically significant." District court opinion pp. 12, A. 160. However, the Judge then undertook his own analysis of the data and concluded that each comparison, except White/Hispanic at "other facilities" which he discounted because of small sample size, showed "significant ethnic difference." District court opinion p. 12, 13, A. 160-61.

The error in Judge Lasker's analysis lies in his use of the term "significance". On defendants' proof, the term was properly confined to the results of concededly appropriate statistical methods. See e.g. Commonwealth of Pennsylvania v. O'Neill, 473 F. 2d at 1030-31; Chance, 330 F. Supp. at 211-212. In Judge Lasker's analysis, "significance" is used to express a layman's reaction to apparently large differences in passing rates within facility groups. However, even "large" face

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(Footnote continued from preceding page)

tently omitted from testimony but set forth in defendants post-trial memorandum and is not significant. See p. 33, ante. The W/H comparison for Green Haven was not computed since there was only one Hispanic candidate. However it was not claimed to be significant by plaintiffs, and on the basis of  $\chi^2$  (chi square) test, it is not significant.

differences in passing rates do not mean that the differences are "significant" statistically, i.e. "different" based on the results of "t" tests or  $\chi^2$  (chi squares).\* Only defendants performed the requisite statistical tests. Thus any conclusion of "significance" by the district court must rely on defendants evidence alone.\*\*

In addition the district court erred in discounting the White/Hispanic passing rate comparison at "other facilities" which showed no disproportionate impact on Hispanics. The Hispanic sample size of 6 which the Judge considered as of doubtful reliability was very close to the N's of 9 (Hispanics

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\* Thus while Judge Lasker is correct in stating that the passing rate of Whites at Green Haven is 31.6% (opinion p. 12, A. 160), or 36 out of 114 candidates (Plfts Ex. 12, A. 1347), and that the passing rate of Blacks is 12.3% (actually 12.5%) (opinion p. 12, A. 160), or 1 out of 8 candidates (Plfts. Ex 12, A. 1343), he is not correct in finding that the difference in rates, 19.1% (31.6-12.5), although arithmetically large, is "significant". The only appropriate method for determining significance between these two samples is a statistical one, e.g. a 't' test, and on the basis of that test, there is no significant difference found in the comparison. The logic behind the use of the statistical test is readily illustrated by the fact that if only one more Black at Green Haven had passed examination no. 34-944, the difference in the arithmetic comparison of passing percentages would change radically. E.g. One additional passing Black would change the Black passing percentage to 25% and the difference between W/B passing percentages would become 6.6%, a reduction in magnitude of 67% from the original comparison of passing percentages.

\*\* Notably, plaintiffs did not offer any support for Judge Lasker's comparisons although they had available to them an expert in testing presumably familiar with the appropriate statistical methods.

at Ossining) and 8 (Blacks at Green Haven) which he used in his own analysis to support conclusions less favorable to defendants. District Court opinion p. 12, A. 160. See discussion ante, p. 34 second footnote.

The existence of the facility effect variable is further reinforced, not refuted as the district court suggests, (opinion p. 10-11, A. 158-59), by reference to the mean score comparisons offered by defendants. (T. 509, 510, 511, A. 724, 746, 747; Plfts. Ex. 12, A. 1343-1348); Defts. Ex. DD, A. 1934.

The mean scores of all ethnic groups at Ossining, where the majority of minority candidates is located, are lower than the mean scores of the corresponding ethnic groups at "other facilities". The figures for Whites, Blacks and Hispanics at Ossining/ "other facilities" are 47.32 v. 49.00 (White); 42.96 vs. 45.21 (Black) and 41.56 vs. 48.17 (Hispanic) Defts. Ex. DD, A. 1934.

This pattern of all ethnic groups doing less well at certain facilities than at "other facilities" is again illustrated by reference to the Green Haven total test means. Again, the mean scores of all ethnic groups are lower than the corresponding groups at "other facilities". The figures for Whites, Blacks and Hispanics at Green Haven/ "other facilities" are 48.68 vs. 49.00 (White); 42.00 vs. 45.21 (Black) and 44.00 vs. 48.17 (Hispanic). Defendants Ex. DD, A. 1934.

In addition the average of the differences between ethnic groups at each facility is smaller than the statewide difference. Thus the average of the White/Black within facility differences is 4.94 and less than the White/Black difference in the statewide pool, 5.7. The average of the

White/Hispanic within facility differences is 3.76 and less than the White/Hispanic difference in the statewide pool, 4.5. These comparisons clearly establish that facility effect is contributing to the observed differences in the statewide pool, thus necessitating that the facility effect variable be screened out.

Judge Lasker's review of the total mean scores and his conclusion therefrom that facility has no effect on observed differences in the statewide pool omits consideration of the facts shown above, to wit, that the level of candidate performance of all ethnic groups is lower at Ossining and Green Haven than at "other facilities". Further, his review relies in main part and inappropriately on the use of statewide candidate pools as the standards for comparisons. The inappropriateness of the use of those pools as standards is illustrated by the fact that 80% of the statewide Black pool is from Ossining and therefore that pool effectively reflects the performance of Ossining Blacks, whereas 85% of the statewide White pool is from "other facilities" and therefore that pool effectively reflects White performance at those facilities. Thus, the apparent ethnic differences in the statewide pool urged by Judge Lasker are in reality comparisons between Ossining Blacks and "other facilities" Whites made in face of the established fact that a portion

of those apparent differences has nothing to do with ethnicity.\* Defendants note in addition that Judge Lasker's comparisons contain obvious errors like describing 4.36 (W/B difference at Ossining) as "virtually identical" with 5.7 (W/B difference in the statewide pool when it is in fact 24% smaller; failing to call attention to the fact that White/Black difference at "other facilities" is 34% smaller than the statewide White/Black difference; and rejecting a sample size of 6 (Hispanics at "other facilities") while using N's of 1, 8, 9, and 14 to support his own comparisons. See district opinion pp. 10-11, A. 158-59.

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\* One obtains the impression from Judge Lasker's comparisons that he believes that if he succeeds in showing an apparent difference between ethnic groups, he has succeeded in overcoming defendants' argument that there is a facility effect. This view misses the point since defendants do not argue that all difference is to be identified with facility effect, but rather that, in this case, observed differences in the statewide pool are identified with both facility effect and ethnicity; that only ethnic differences are relevant differences; and that therefore "true" ethnic differences and facility effect must be separated and only ethnic difference assessed for purposes of determining the viability and extent of the prima facie case.

In sum, defendants' within facility passpoint comparisons were legally and factually sound. The results of those comparisons showed that examination no. 34-944 had a substantial disproportionate impact only on Blacks at Ossining, and those results should have been accepted as the most accurate assessment of ethnic differences resulting from the examination.

B. The district court should have excluded the Law Subtest from the prima facie case on defendants' showing that subtest had no disproportionate impact on Ossining Blacks.

Defendants carried their statistical analysis through each of the five subtests comprising examination No. 34-944 and compared the performance of the ethnic groups by subtest mean score both within each facility and in the statewide pool to determine if significant differences existed. T. 509-512, A. 745-48; (T. 515-516, A. 751-52; Defts. Ex. DD, A. 1934).

The purpose of this inquiry was to find those subtests which gave rise to differences appearing among ethnic groups. (T. 515-516, A. 751-52).

Accepting defendants' view that only Ossining Blacks can support the requisite prima facie showing of disproportionate impact and proceeding to analyze subtest performance, one finds their claim can not include the law subtest since the difference is the Ossining White/Black mean scores on that

subtest is not not significant. Defts. Ex. DD., A. 1934.\*

The use of subtest approach with respect to examination no. 34-944 is consistent with the fact that a candidate must achieve a passing score on the "entire" examination and with the opinion of this Court in Vulcan, supra. See district court opinion, 15-16, A. 163-64.

While it is true that a candidate's passing score is a composite of his performance on all the items (questions) rather than an average of his subtest mean scores, it is equally true that when an examination consists of separate subtests only some which are identified with significant ethnic differences, comparing composite scores between ethnic groups means comparing ethnic differences plus random or "chance" wrong answers. Accordingly, where the subtest on

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\* Additional within facility subtest comparisons show that there was no significant difference in W/B performance on any subtest at Green Haven and no significant difference in W/H performance on any subtest at "other facilities". Significant differences with respect to W/B performance were found on the Report Preparation subtest at "other facilities" and with respect to W/H performance on the Methods and Supervision subtests at Ossining. Defts. Ex. DD, A. 1934. The effect of these findings is mooted by the fact that there was a plaintiff (Ossining Blacks) before the district court who could shift to defendants the burden of demonstrating the job-relatedness of all subtests except law. The mooted effect arises because a failure of proof of defendants on any subtest properly in issue would lead to a declaration of invalidity which would operate as to all persons regardless of their status as plaintiffs, i.e. if an alleged content valid examination is found not job-related, it is invalid as to all persons, not simply "as applied" to the ethnic groups it disproportionately affected and at whose instance suit was brought.

the examination are severable and the data on comparative performance available, as herein, it is appropriate to consider only those subtests which are established as a source of the ethnic differences found in the composite score and to shift the burden of proof to defendants only for those subtests.

This Court has not adopted the Judge Weinfeld's comment in Vulcan, 360 F. Supp. at 1272, to the effect that it is inappropriate to consider the separate components of an examination procedure in terms of their separate impacts. Just the opposite, this Court recognized separability within the examination procedure when it stated that had the physical and medical components as distinct from the written component of the Fireman's examination there in issue been shown to be "biased," the plaintiffs' constitutional claims against the written component would have been vitiated. 490 F. 2d at 392.\*

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\* Notably, Judge Weinfeld's original comment was made in answer to defendants' argument that since passing data was only available for a point in time after the written, physical and medical components had been completed, it was possible that the physical and medical components, not the written test, were responsible for any disproportionate impact. Plaintiffs offered proof that the written test was indeed responsible for the disproportionate impact. Unlike defendants herein, defendants in Vulcan did not offer any proof in support for their argument, nor any proof of the impact of any of the components in the examination process. 360 F. Supp. at 1271-1272.

POINT II

THE DISTRICT COURT ERRED IN FINDING THAT DEFENDANTS FAILED TO PROVE THAT EXAMINATION NO. 34-944 WAS JOB-RELATED. THE EXAMINATION WAS DEMONSTRATED TO BE CONTENT VALID ON THE BASIS OF THE TEST DEVELOPMENT PROCEDURES EMPLOYED AND THE COMPETENCE OF INDIVIDUALS RESPONSIBLE. IN ADDITION, THE EXAMINATION WAS SHOWN TO BE JOB-RELATED ON THE BASIS OF CONVINCING PROOF CONTAINED IN THE RECORD.

Assuming that plaintiffs establish a prima facie case, defendants' obligation to prove job relatedness consists of a showing that the examination, or those subtests properly in issue,\* are "demonstrably a reasonable measure of job performance." Griggs v. Duke Power Co., 424 U.S. 424, 436 (1971). See also Vulcan, 490 F. 2d at 393 (citing Castro, 459 F. 2d at 732); Bridgeport, 482 F. 2d at 1337; Chance, 458 F. 2d at 1176-1178. As viewed by Judge Friendly in Vulcan, id., this demonstration requires defendants to go forward with evidence and to persuade the court that there is a "substantial" relationship between the examination under review and the job, albeit they need not prove this relationship "to the hilt."

\* In the district court defendants undertook to prove the job-relatedness of all five subtests on examination No. 34-944 without prejudice to their argument that at least the law subtest was not drawn into question on a proper view of the prima facie case. Defendants take the same position before this Court.

The judicial function has been further described by the Division of Industrial and Organizational Psychology of the American Psychological Association, the group responsible for the "APA Standards" (Plts. Ex. 26, A. 1407-1429):

...[C]ourts should adopt a standard for establishing whether tests are reasonably related to a person's capability to meet the job needs of the employer; such a standard should demand meaningful proof of relationship to legitimate employer needs yet be flexible enough to permit the continued utilization of standarized selection devices which may offer an effective method of ensuring that employment is obtained on the basis of qualifications for the job or jobs in question rather than on the basis of subjective and possibly biased judgments. [\*]

In determining whether defendants had met the test of "substantiality" or "meaningful proof," the District Court stated that it was applying a "sliding scale" wherein the better the quality of the test development process, the less proof of job-relatedness it would require, and the poorer the quality of test development, the more proof, to the point where "only the most convincing testimony will suffice."

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\* Brief Amicus Curiae of the Executive Committee of the Division of Industrial and Organizational Psychology, American Psychological Association in United States v. Georgia Power Co., 457 F. 2d 906 (5th Cir., 1973) at p. 8 (Footnotes omitted.) Copies of the "APA brief" will be provided to the Court and the parties upon request.

Vulcan, 360 F. Supp. 1276; district court opinion, pp. 21-23, A. 169-171. The sliding scale approach has been previously approved by this Court and may be employed in conjunction with content validation, used by defendants with respect to examination no. 34-944, since a showing that that form of validation has been properly pursued is synonymous with competent test development and thus gives rise to an inference of job-relatedness without the need for additional proof. Vulcan, 490 F. 2d at 395-396. Accordingly, defendants do not except to the application of the sliding scale approach to this case. However, in using this approach, the district court erred on two counts: first, in finding that the test development process for examination no. 34-944 did not meet established standards of content validity; and second, assuming arguendo that such standards were not met, in failing to seriously consider, at the other end of the "scale", whether examination no. 34-944 was nonetheless job-related on the basis of available and defendants believe "convincing", evidence contained in the record.\* See Vulcan, 490 F. 2d at 394 and 360 F. Supp. 1276-1277.

\* See District court opinion pp. 36-39, A. 184-187 wherein Judge Lasker notes that "positive evidence of job-relatedness is conspicuous by its absence" (p. 36, A. 184) and that certain "important" "traits, skills and abilities" were omitted (p. 38, A. 186). He then appears to conclude that defendants have not met the Vulcan standard of "convincing" evidence necessary to prove job-relatedness in the absence of an appropriate validation strategy. District court opinion, p. 36, A. 184 citing Vulcan, 360 F. Supp. at 1276. But see the district court's earlier comment that the demonstration of content validity was the "dispositive issue in the case." District court opinion p. 20, A. 168.

See also Allen v. City of Mobile, 331 F. Supp. 1134, 1145-47 (S.D. Ala. 1971), affd. 466 F. 2d 122 (5th Cir. 1972).

A. Examination No. 34-944 met established standards for content validity. Both the competence of the test development process and the individuals responsible for it were demonstrated.

As this Court has stated on several occasions: "An examination has content validity if the content of the examination matches the content of the job." Vulcan, 490 F. 2d at 395; Guardians, 482 F. 2d at 1338; Chance, 458 F. 2d at 1174. See APA standards, Plfts. Ex. 26, pp. 12-13, A. 1415; T. 807-808, 876, A. 1043-44, 1114. It is not required that the match be a perfect one. The EEOC Guidelines, repeatedly cited by plaintiffs as acceptable professional standards, state that an examination is content valid if it "consists[s] of suitable samples of essential knowledges, skills or behaviors composing the job in question." EEOC Guidelines § 1607.5(a), Plfts. Ex. 27, A. 1430, 1432.\* (Emphasis added). See also the APA standards stating (Plfts. Ex. 26, p. 12, A. 1415): "Content

\* The EEOC Guidelines 1607.5(a) also require that content valid tests be "well-developed." Defendants have read this requirement as meaning that the test be a competent measuring device. The quality of examination No. 34-944 as a competent measure is covered in sub-point B, infra. If "well-developed test" is read to refer the process by which the sample of the "essential" K S & A's are ascertained, the subject is covered in this sub-point.

validity is demonstrated by how well the content of the test samples the class of situations or subject matter about which conclusions are to be drawn." (Italics deleted). Accord, Castro, 354 F. Supp. at 792. Judge Lasker also apparently accepted the principle that a content valid test need only consist of a suitable sample of knowledges, skills and abilities (K S & A's) in order to match the job.\*

The match between job and the test "sample" is obtained through what may be conveniently described as the test development process. Through this process, certain knowledges, skills and abilities are determined to be "essential" or "important" and a "suitable sample" is selected for inclusion on the test. In content validation, these decisions are made cooperatively by subject matter experts, herein Correctional Services' employees who provide the "content"

\* We note the following exchange between defendants' expert Dr. Erwin K. Taylor, past President of the Division of Business and Industrial Psychology of the APA, and the Court (T. 806-807, A. 1042-43):

Q. In your opinion, does any selection device or any set of selection devices ever cover the whole job? Do you ever know when you have reached the end?

A. [Dr. Taylor] No. In the first place...  
The Court: I don't think you need to expostulate on that. I believe even in your field it is [not] possible to reach the absolute truth.  
The Witness [Dr. Taylor]: Especially in my field, your Honor.

input,\* and psychometricians ("test constructors"), herein experienced Civil Service personnel, who evaluate the data, decide what areas are amenable to testing, choose the selection device, or devices, and assume the responsibility for providing competently constructed measuring instruments. District court opinion, p. 23, A. 176; T. 807-808, A. 1043-44.

In reviewing the co-operative decisions made with respect to examination no. 34-944, it is well to keep in mind that the goal of a content valid process is not to select a sample of K S & A's from an abstract universe which might

\* With respect to examination no. 34-944, the "content input" was provided in large measure by the presence of "live" Correctional Services employees who participated in the scope conference (Kevins and Bankhead, Plfts. Ex. 9, A. 1337; T. 529-532, A. 765-68); approved the examination announcement including scope statement and eligibility requirements (Plfts. Ex. 17, A. 1352; Quick, T. 451-454, A. 687-690; T. 455-458, A. 691-694; T. 460-461, A. 695-700); participated in the "job analysis," the development of the sub-test descriptions ("K S & A Statements") and the item writing (Plfts. Ex. 8, A. 1332; Plfts. Ex. 18, A. 1355; Plfts Ex. 19, A. 1369; Sperbeck, Cuiros and Harris, T. 739-749, A. 975-85); reviewed the Laws, Method and Judgment sub-tests prior to the administration of the examination (Sperbeck, T. 749-751, A. 985-87) (Siegel, T. 548-552, A. 784-88); reviewed and evaluated the entire examination (Preiser and Quick, T. 484-487, A. 720-25). "Content" can also be provided in recorded form as by reference to past sub-test descriptions or past examinations (e.g. T. 530-531, A. 766-67) or by the occupational survey (Defts. Ex. E, A. 1516-1695), a series of "post" audits at correctional facilities. The audit data is assembled and organized by the psychometrician (Classification and Pay Analysts, Defts. Ex. C. A. 1493) from information provided by Correctional Services, the subject matter experts, or by direct observation.

be labeled "good Correction Sergeantry" but rather, as the APA amicus curiae brief notes, to meet the legitimate needs of the employer as the employer perceives them. APA amicus curiae brief, p. 8 in United States v. Georgia Power Co., supra. Thus, if Kenneth Siegal, the personnel examiner principally responsible for 34-944, had been employed by another jurisdiction, he might well have conducted a content valid examination that was limited to custody and security functions rather than one which included the Sergeants' role in inmate rehabilitation and resocialization.\* Since the situational perspective is the

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\* The transition from the view of line personnel as "prison guards" to one where they are active participants in inmate rehabilitation is reflected in the occupational survey (Defts. Ex. E. A. 1568-69, 1570-72, 1614-17, 1623-26; 1643-46); the revisions in the class specifications of the Correction Officer series for 1955, 1962, 1964, 1967, 1971, (Plfts. Ex. 43, A. 1471, 1474, 1477, 1480, 1484) and 1972 (Plfts. Ex. 4, A. 1327). The rehabilitative approach also appears in the sub-test descriptions for examination no. 34-944 (E.g. Plfts. Ex. 8, A. 1332, 1333, 1334 and on the examination itself. E.g. the Law's subtest excludes "Rule 8" items from the Department Rule Book, Defts. Ex. O. (use of force and discipline) but includes items on approved articles (#4) and residential treatment facilities (#12). Methods includes items on community based treatment (#16), importance of co-inmate contact (#'s 19, 21), morale and discipline (#'s 20, 21), new programs (#'s 23, 27), primary goals v. punitive measures (#'s 28, 29), mores of inmate ethnic groups (#30). Supervision emphasized the need for personalized supervision to train and maintain level of performance (#'s 31-45), Report preparation tests clear report writing necessary for increased "in-house" hearing procedures (#'s 46-60) (Plfts. Ex. 18, A. 1355-1368). Judgment asks about inmate needs and health (#'s 1, 7, 15), self-evaluation (#9) (Plfts. Ex. 19, A. 1369-1371).

controlling one, Dr. Taylor was correct in stating that the best, and indeed the only judge of whether the test development process has achieved its intended result, i.e., produced a content valid test, or one that is in fact a suitable sample of the job, is the employer and subject matter expert who must use it. T. 810-815, A. 1046-51. Dr. Richard Barrett, plaintiffs expert took no exception to Dr. Taylor on this point, and himself refused to testify whether or not examination no. 34-944 was or was not content valid. T. 893-894, A. 1131-32. Accordingly, the best evidence of the content validity of examination no. 34-944 was testimony of Deputy Commissioner William Quick, a facility operations expert of long standing (T. 440-451, A. 676-87) who stated that he had reviewed the examination and approved it as had Commissioner Preiser. (T. 482, 484-486, A. 713, 720-22). See also testimony of Hylan Sperbeck, T. 750-751, A. 926-87). Notably, plaintiffs could have called an "operations expert" to testify to the lack of

content validity of examination no. 34-944, but did not do so.\*

Although there have been few litigated cases where defendants' evidence could be fairly characterized as a coherent test development process, the procedures which distinguish a competent from an incompetent process can be found in the

\* The district court appears to have preceived the relevance of the employer's opinion of whether an examination tests a correct "sample" as evidenced in the following exchange (T. 824, A. 1060):

Q. [to Dr. Taylor] Let's assume that a deputy commissioner with extensive live experience in the sergeant title and in higher titles reviewed this entire examination after it was given and indicated his approval of it. Would you consider that type of reaction -- and I am not asking you to evaluate his competence of course, but is that type of consideration at least some evidence to be considered in determining whether or not the test is in fact content valid?

The Court: I really don't think Dr. Taylor knows any more about that than I do, and I think he knows an awful lot. Of course if somebody at a level of responsibility approves the test that is some evidence that he thought it was good and he is supposed to be trained and it ought to mean something.

Mrs. Gordon: All I am trying to establish is in making that [content validation] model the kind of subject matter expertise Dr. Taylor would look to.

See also Judge Lasker's comments on Dr. Barrett's review of the substance of some of the items at T. 906-910, A. 1144-48. In view of the district court's comments, defendants find it remarkable that the opinion below does not refer to the testimony of Deputy Commissioner Quick at all.

existing case law. See e.g. Chance, 330 F. Supp. at 218-220, citing following procedures as consistent with the content validation of Principal and Assistant Principal examinations: Duties statement prepared by Board of Education; expert panel assembled to distinguish more important from less important duties and to consult with interested persons; Board of Examiners' staff prepares items using panel and the consultants as resources; \* Davis v. Washington, 352 F. Supp. 187 (D.C.D.C. 1972) sustaining promotion examination for Police Sergeant developed under following procedures: Solicitation of items from "men in the field" based on situations where knowledge of "correct" judgment was important; review of items by bi-racial panel of senior officers and psychometrician; and candidates' challenges

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\*The invalidation of the examinations in Chance rested on the district court's finding that the procedures as alleged were not in fact followed. 330 F. Supp. at 218-219. The finding that the procedures were themselves sound relied in part on the testimony of Dr. Barrett, plaintiffs' expert in that case as well, whose opinion of what the proper procedures were was the same as that advocated by the Board of Examiners with "few differences". 330 F. Supp. at 219. The finding that the procedures were not in fact followed relied on the affidavit of Peter J. Strauss, one of the alleged consultants to the test preparers, who stated that his views had not been sought; that there was (apparently) only one meeting; that no consensus was obtained; and that there had been no follow-up by the Board of Examiners; on the position of then Chancellor Scribner who had refused to defend himself; and on the irrelevance of most of the materials which were generated in the course of the process. 330 F. Supp. at 219-220.

to items after administration of examination. Compare Vulcan, 360 F. Supp. at 1275 following steps in preparing Fireman examination found inadequate: Test constructor referred to last examination and announcement class specifications and Fire Department magazine, and had "contact" with Chief in charge of training who approved the subjects from the prior examination and suggested the addition of current events section which the examiner in charge in fact added.

As will appear from the discussion below, the test development process for 34-944 came within the legal standards established by Chance and Davis, and is not characterized by the deficiencies of Vulcan.\* With respect to professional standards, the district court had available the testimony of defendants' expert, Dr. Taylor, who defined content validation, reviewed the procedures used to generate examination no. 34-944 and con-

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\*See also Guardians, 354 F. Supp. at 792 where the district court noted that the sampling was not "representative" of the job, and this Court noted that the emphasis was on arithmetic and verbal skills only "superficially or peripherally related to police activity." 492 F. 2d at 1338. The question of the validity of the probation examinations was not reached. 354 F. Supp. 796.

cluded that a competent test development process had been followed.\* (T. 790-794, A. 1026-30; T. 807-810, A. 1043-46).

The EEOC Guidelines and APA Standards, generally cited as embodying the relevant profession standards, were also before the court. Plfts. Ex. 26, A. 1407; Plfts. Ex. 27, A. 1430.\*\*

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\* Dr. Barrett, plaintiffs' expert, agreed that the definition of content validity given by Dr. Taylor and employed by defendants throughout was correct (T. 876, A. 1114); that the process by which examination no. 34-944 was generated was proper evidence of its content validity (T. 884, A. 1112); that the "general outline" of the process was "correct" but that he had a "feeling" it had not been implemented in "enough detail" (T. 895, A. 1133); and that he could not give professional opinion on whether examination no. 34-944 was or was not content valid (T. 894, A. 1132). Put another way, since Dr. Barrett was not a subject matter expert himself nor had he worked closely with a subject matter expert appropriate for 34-944, he didn't know if any "details" were in fact missing, or if they were, what they might be.

\*\* Neither of these documents provides an operational definition of the test development process much less a "standard" against which a given process can be measured to determine if it is competent or incompetent. The only relevant operational statement for content validation is found in the EEOC Guidelines § 1607.5(a) (A. 1432): "[E]vidence for content... validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests)...." This type of "working" definition lends further support to defendants' view that the best evidence of "sufficiency" and "demonstrable relevance" is found in the opinion of the subject matter expert who is obliged to use the test, herein Deputy Commissioner Quick and Commissioner Preiser. See discussion ante, p. 56-58.

The district court classified the test development process for a content valid examination under four headings which it in turn applied to the development of 34-944. Each heading is intended to reflect the cooperative effort of subject matter experts and test constructors. The headings are as follows: 1) "Job analysis" to determine essential knowledges, skills and abilities; 2) determination of the scope of the examination, the selection device or devices to be used, the weight assigned to the different devices if more than one is used in a selection process; 3) development of the items; and 4) establishment of a pass point. District court opinion p. 23, A. 171. Defendants accept these headings for purposes of argument with the caveat that headings 1-3 should not be considered as sequential or necessarily discrete events. See e.g. Vulcan, 360 F. Supp. at 1275 ("preferable professional procedure is to conduct job analysis in the course of preparation of the examination"). Davis v. Washington, supra (solicitation of items from men-in-the-field and review by panel of senior officers and psychometrician was job analysis).

### 1. The "Job Analysis"

There is absolutely no legal or professional requirement that a "job analysis" be presented in a single document or that it be in written form at all. Indeed, as Dr. Taylor testified, job analysis is a "process"; not a "product" (T. 794, A. 1030). Samuel Taylor, Chief of the Selection Process Evaluation Section, the unit responsible for 34-944 defined job analysis similarly to Dr. Taylor (A. 599-600):

"Most importantly, [job analysis] is a series of operations or understandings, by which you identify what people do and why and what can be tested and what should be tested - The process itself.

Accordingly, it was both reasonable and professionally sound for defendants to demonstrate the job analysis for examination no. 34-944 through documents, events and understandings.

The purpose of the job analysis is to obtain a "thorough knowledge of the job", Vulcan, 360 F. Supp. at 1274, or in terms of the EEOC Guidelines, § 1607.5(a), to obtain enough job data to provide "sufficient information" to establish

the probability that the K, S & A's tested for are in fact a suitable sample of the K, S & A's composing the job. (A. 1432).\* This purpose was in fact achieved during the job analysis for 34-944.

The job analysis for examination no. 34-944 was co-extensive with the test development process as it was in Davis v. Washington, supra, and as it would have been in Chance had the court approved procedures been followed in fact. 330 F. Supp. 218-219. Both the job analysis and test development process may be considered to have started with the scope of conference on June 1, 1972 (See Plfts. Ex. 9, A. 1337) and to have ended on or about October 11, 1972 when the subtest descriptions (Plfts. Ex. 8, A. 1332) and examination had been finalized (Plfts. Exs. 18 and 19, A. 1335, A. 1369) and the Law, Methods and Judgement sub-

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\*In his discussion of job analysis, Judge Lasker includes the determination of the importance of the K, S & A's relative to each other and of the level of proficiency, or difficulty of the information to be sought from the candidates. District court opinion, pp. 23-24, A. 171-72, citing Vulcan, 360 F. Supp. at 1274. While it is true that the development of a selection device necessarily implies that such judgments will be made (and they were in fact made with respect to 34-944), no legal or professional standard requires that they be made as part of the job analysis, particularly if job analysis is viewed as an initial, discrete step in test development. E.g. The approved procedures in Chance do not refer to relative importance or difficulty levels, 330 F. Supp. 218-219. The EEOC Guidelines (Plfts. Ex. 27, A. 1430) and the APA Standards (Plfts. Ex. 26, A. 1410-12, 1416-17) are silent on both these points. Notably, in Vulcan there was no job analysis at all (360 F. Supp. at 1275), and no other evidence of a competent test development process so that the question of at what point judgments of relative importance and level of difficulty must be made lest a test development process be invalidated has not been presented in a "live" factual context.

tests last reviewed by Captain Sperbeck. See Entry in "diary" excerpts for 10/11/72, Plfts. Ex. 10, A. 1341.\*

During that period, a series of events and understandings occurred with the participation of both of Corrections personnel, the subject matter experts, and the test constructors which support the conclusion that the process was a thorough one and thus that "sufficient information" was obtained about the Sergeant job to support the content validity of 34-944. EEOC Guidelines § 1607.5(a), Plfts. Ex. 27, A. 1432. At the June 1st scope conference, representatives of Corrections (Nevins and Bankhead) and Civil Service (Siegal, O'Grady, then Siegal's section chief, Etter, Steele and Durovic) had preliminary discussions on the general subject matter areas to be covered on 34-944 and the eligibility (time-in service) requirements.

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\*The above dates must be read with the understanding that the "thorough knowledge of the job" which both job analysis and the "input" of subject matter experts are intended to provide is not readily confined to a chronological period. For example, Nevins and Bankhead who attended the scope conference on behalf of Correctional Services both had substantial prior knowledge of the Sergeant job (T. 529, A. 765) as did Kenneth Siegel (T. 519-522, A. 755-58). Similarly, additional subject matter "input" was provided after the administration of the examination by candidate appeals process wherein a candidate may challenge the relevance of an item as well as the correctness of the key answer. Plfts. Ex. 3, A. 1324-25; Plfts. Ex. 10, "diary" entries for 10/25/72, 11/1/72, 11/16/72, 11/30/72, A. 1341; T. 575-578, A. 811-14. Davis v. Washington, supra.

As to subject matter, it was tentatively agreed that the general areas would be Law, Methods, Supervision, Report Preparation (instead of the subject matter area "understanding written material" used on the 1970 Sergeant examination) and Judgment. As to eligibility requirements, it was suggested that Correction Officers with six months of permanent service be eligible to take the examination and that two years of such service be required for appointment from the resulting eligible list. It was also planned that Correctional Services would provide Captains or Lieutenants to aid in developing items. Plfts. Ex. 9, A. 1337, T. 529-532, A. 765-68.

Following the scope conference, Kenneth Siegal assumed primary responsibility for the development of the examination.\* He determined that the Law area be half the size (15 items opposed to 30 items) it was on the 1970 Sergeant examination (T. 573, A. 809) and prepared a tentative examination announcement.

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\* On or about July 2, 1972 Mr. Siegal joined the Selection Process Evaluation Section, and Samuel Taylor became his supervisor. T. 538, A. 774.

The examination announcement was reviewed by Deputy Commissioner Quick at Corrections who testified that he disapproved the six month/two year eligibility requirement\* but approved the subject matter areas (T. 461, A. 697). Deputy Commissioner Quick further testified as to the reasons why he thought the subject matter areas were appropriate (T. 461-464, A. 697-700, T. 482, A. 718) and that he did not believe that any one area was more important than another (T. 490, A. 726). Final agreement between Corrections and Civil Service on the eligibility requirement (two years of experience to take the examination and three years before appointment) and the five subject matter areas for examination no. 34-944 is expressed in the final examination announcement. Plts. Ex. 17, A. 1352-54; T. 453-457, A. 689-93. Notably, plaintiffs expert, who was familiar with the documentary evidence and with the testimony at trial and who had visited Green Haven Correction Facility in preparation for his testimony (T. 870, A. 1108) never suggested any subject matter area that could have been tested for that was not in fact covered.\*\*

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\* Mr. Siegel did not personally approve of the six months/two year proposal, but had reflected the consensus of the June 1st, meeting (T. 537, A. 773).

\*\*See Subpoint C infra for discussion of alleged omissions referred to in the district court opinion at p. 38, A. 186.

From approximately July 26, 1972 until approximately October 11, 1972, Mr. Siegal and his assistants (Elaine Walter and later James Bouldin) and the cross-occupational skills unit of the Department of Civil Service generated the subtest descriptions and related K, S & A statements and the items for 34-944. Plfts. Ex. 3. at A. 1322-24, (Report Preparation and Supervision); Plfts. Ex. 8 at A. 1332-36; Plfts. Ex. 10, A. 1339-41; T. 548-554, A. 784-90; T. 558-574, A. 794-810; T. 628-705; A. 918-41. Since the subtest descriptions and K, S & A statements were drafted concurrently with the development of the items, they are unquestionably one of the "products" of the job analysis process, at least in their final form. However contrary to the inference drawn by the district court, their the concurrent development does not make them useless or unprofessional. District court opinion pp. 28-29, A. 176-77. Indeed, it appears the same concurrent development of subtests, K, S & A's and items was followed in Davis v. Washington, supra, and sustained. It was likewise approved by Dr. Taylor, recognized as sensible

initially by the district court. (T. 815-16 A. 1051-52) and passed Dr. Barret without criticism.\*

On the law, methods and judgment subtest, Mr. Siegel's group worked directly with three subject matter experts, Sperbeck, Harris, a Black, and Cuiros, then Lieutenants with the Department of Correctional Services. T. 549, A. 785. Mr. Siegel did not simply ask the Lieutenants to prepare items, but rather he discussed the Sergeant job with them, asked them to distinguish what was "important" from unimportant, then to prepare draft items which were in turn discussed within the group together with items prepared by Mr. Siegel and his assistants. T. 550-552, A. 786-88; T. 740-749, A. 976-85. There were at least five

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\* Defendants believe that Mr. Siegel's testimony on the generation of the subtest descriptions and K, S & A's is quite clear and consistent with both his deposition and Samuel Taylor's testimony. See district court opinion at p. 29, A. 177. The following series of questions and answers is referred to by the district court to support the opposite conclusion (T. 665-66, A. 901-02):

[Mrs. Greenberg]

Q. What use is made of the K, S and A statements?

[Mr. Siegel]

A. The statements themselves is -- primarily you say for use in this examination for documentation. What use is made by other people would depend on the circumstances.

Q. Again referring to your deposition, page 36.

Q. What use is made of the K, S and A statement?

A. The K, S and A statements are used in guidelines, in effect, in preparation of particular items or of items in general on -- in that they represent the -- the K, S and A statements

Ftn. Continued

represent those relevant portions of the position, let's say, which we wish to test and therefore act as a guide in telling us the types of items to write or select.

Would you agree with that now?

A. Yes. I think the question you asked me before -- I assume was referring to the documentation of the K, S and A's. I am a little confused.

Q. The question before I believe was what use is made of the K, S and A statements. Perhaps you misunderstood what I meant. Would you agree with the answer you gave on your deposition?

A. Yes. It is to a large extent a concurrent process, certainly in this case, where we are both preparing individual items, all right, and selecting K, S and A's.

Q. Were you preparing individual test items before the K, S and A's were completed?

A. We have three individuals who worked with us who are working in the department. In our discussions with them we discussed the job. We asked them to prepare items, and in the process of their giving us items they brought to light certain relevant portions of the job.

Q. So some of the items that are on the exam were prepared before the K, S and A statements were prepared?

A. Yes, I would think so.

Q. I believe you testified before that you participated with consultants from the Department of Correctional Services in the preparation of items for three of the subtests.

A. That's right.

such discussion sessions between three and five hours each (T. 744, A. 980); 50-60 items were prepared in written draft by the subject matter experts and additional situations were discussed.\* T. 569-570, A. 805-06; T. 745, A. 981. As is apparent, the process followed by Mr. Siegel to generate the

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\* The following exchange between the court and Mr. Siegel illustrates how this cooperative effort between subject matter experts and test constructors worked (T. 551-552, A. 787-88)

THE COURT: . . . How does one go about, out of thousands of things that could be asked, deciding what 15 [items per subtest] you will ask?

THE WITNESS [Mr. Siegel]: Well, as I say, we [Mr. Siegel and his assistants and the three Lieutenants] talked about the job itself. We talked about what people do. Then the instructions I gave to these people, because I wanted as much input from them as possible, was: "Go back in your own experiences and decide what is important. Think about the problems that you have had, and so on, and prepare questions relating to these things. Of course, they would come back with a variety of questions.

THE COURT: Did they come back with written proposals?

THE WITNESS [Mr. Siegel]: That's correct, type-written or handwritten questions. And then we would sit down as a group and look at each question and discuss it, decide whether or not it was relevant, whether or not we should use it, whether it was too easy, too hard, and in some cases, for instance if we felt it was not appropriate, the question was discarded. If we felt it would be appropriate let's say on a lieutenant's level as opposed to a sergeant's level, it certainly would not be asked for the sergeants. If it was on a higher level, we might file it away for use at a later date.

subtest descriptions and items on law, methods and judgment was itself a job analysis, or even more appropriately a segment of the job analysis and test development process for 34-944. It was substantially identical with the job analysis - test development process sustained in Davis v. Washington, supra.

The subtest descriptions and items for the Supervision and Report Preparation subtests were developed by the specialized cross-occupational skills unit of the Department of Civil Service. The responsibility for these subtests was delegated to this unit by Mr. Siegal after the scope conference and after Deputy Commissioner Quick approved the two subject matter areas for inclusion on the examination. All the items on the two subtests were reviewed and approved by Mr. Siegal prior to the administration of the examination and by Commissioner Preiser and Deputy Commissioner Quick prior to Commissioner Preiser's decision to participate actively in the defense of the suit.

(A. 602-10; T. 460-464, A. 696-700; T. 482, A. 718; T. 561-566, A. 797-802). The Supervision and Report Preparation subtests do therefore reflect the input of subject matter experts, and defendants submit, their job relevance was not open to serious

question.\* Compare district court opinion at p. 31, A. 129. Notably, Dr. Taylor found nothing remarkable about the use of the specialized unit to generate these two subtests (T. 814-15; A. 1050-51): Dr. Barrett again passed this procedure without critical comment.

The final subtest descriptions and related K, S & A statements for Judgment, Methods and Law are set forth in full in Plfts. Ex. 8, at A. 1332, 1333 and 1334 respectively. The subtest descriptions and related K, S & A for the Report Preparation and Supervision subtests are set forth in brief in Plfts. Ex. 8, at A. 1335 and 1336 respectively, and in more detail in Plfts. Ex. 3, A. 1322-24.

On the basis of the procedures followed, defendants submit that the subtest descriptions were based on "sufficient information" obtained during the course of "job analyses" and thus should have been accepted as reflecting a "suitable sample" of the job tasks and important or "essential" K, S & A's within a given subject matter area. Plfts. Ex. 27, § 1607.5(a), A. 1430. Compare district court opinion p. 28, A. 175. We

\* See e.g. comments of Judge Lasker at T. 252-253, A. 489-90 finding as fact that reports were written and that they needed to be in understandable form.

recite the Judgment subtest description and related K, S & A's in main part as illustrative and for the convenience of the Court (Plfts. Ex. 8, p. 1332).

Definition of K, S & A's  
(underline key words):

Ability to evaluate situations that might arise in a correctional facility and determine what, if any, action should be taken by an officer or supervisor. Situations involve supervisor/officer, supervisor/inmate, officer/inmate and supervisor/public relationships.

Definition of Test Tasks

Candidates must read the situation, evaluate it, decide what type of action is warranted for that particular situation, and choose the response that best indicates that action. Test items deal with such job tasks as (a) assigning correction officers to posts of duty, (b) enforcing proper performance of duties (c) making rounds to oversee security procedures, sanitary and safety conditions, (d) advising correction officers on duty, (e) cooperating with non-custodial employees, (f) preventing disturbances and escapes, (g) participating in inmate rehabilitation, (h) overseeing meals and general movement of inmate population, (i) escorting prisoners to other prisons, courts, etc., and (j) acting as 2nd in command under Lt. on night shift in a facility.

Appropriate For:

State Correctional promotion titles (male and female) above the rank of Correction Officer.

Situations are particularly appropriate for line personnel rather than hospital personnel.

There remain two additional documents that were consulted during the course of the job analysis: the Occupational Survey ("Job audit"), Dfts. Ex. E, A. 15-6-1695 and the Class specifications, Plfts. Ex. 4, A. 1327-29. Both were criticized as inadequate by the district court. Opinion pp. 26-28, A. 174-76. First, the district court erred in characterizing of these documents as "substitutes for a job analysis". District Court opinion p. 27, A. 175. They are parts of the job analysis in that they are data about the Sergeant job and related classes ("titles") gathered largely empirically in the instance of the audits (Dfts. Ex. E, A. 1516) and presented in more organized and distilled form in the Class Specifications (Plfts. Ex. 4, A. 1327). Moreover, the use of the term "substitutes for a job analysis" is inconsistent with the district court's later and correct finding that the subtest descriptions and K, S & A statements (Plfts. Ex. 8, A. 1332-36, Plfts. Ex. 3, A. 1322-24) were the "end product of the job analysis 'process,'" thus conceding that a job analysis was in fact done. District court opinion p. 29, A. 177. Second, the fact that the job audits were prepared following a request from the union that the Correction Officer, Sergeant, Lieutenant, and related hospital titles be up graded for salary purposes, does not make them "almost irrelevant to the case" (District court opinion p. 26, A. 174) since the argument in support of the request was that the duties of the positions had changed, requiring the

line officer to participate more intensively in inmate resocialization and the purpose of the audits was to see if such changes had in fact taken place. See Plfts. Ex. 7, A. 1331 and Defts. Ex. E, A. 1568-69, 1570-72, 1614-17, 1623-26, 1643-46). Changes based on earlier audits like Defts. Ex. E, and on that audit as well appear the series of revised Class Specifications placed in evidence. Plfts. Ex. 43, A. 1471 (1955) 1474 (1962); 1477 (1964); 1480 (1967); 1484 (1971); and Plfts. Ex. 4, A. 1327 (1972). The substance of the 1971 and 1972 changes are stated in Plfts. Ex. 3, A. 1319-20.\* Of course the purpose of the participation of Deputy Commissioner Quick and the three line officers in the test development process for 34-944 is to pick up changes in the job that have occurred since the 1970 audits and 1972 revisions of the specification as well as to obtain more in depth information and incorporate the approach that Corrections wanted to take at the time of 34-944.\*\*

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\* Both the job audits and the Class Specifications were prepared by the Classification and Pay Analysts in the Department of Civil Services. The minimum qualifications for that title series are set forth in Defts Ex. C, A. 1493-96.

\*\* Mr. Siegel and his staff were the major users of the job audits (Defts. Ex. E, A. 1516). Mr. Siegel's purpose was to familiarize himself with the line Correction and hospital Correction series. T. 521, A. 757. He did this prior to the time he started work on 34-944. The knowledge he gained from the audits is thus properly viewed as a base to which he added more detail as he proceeded through the test development process. T. 668-669, A. 904.05.

Third, the fact that the job audits were not used as a source for particular items, albeit they did provide Mr. Siegal with information about the "type of situations that we wanted to frame questions in" (T. 668, A. 904) is not a "critical point." District court opinion p. 27 A. 175. There is no professional requirement that items on a examination be expressly referenced to the "empirical" data gathered during the course of the job analysis, particularly where the data is up-dated by additional empirical inputs of subject matter experts who participate directly in the test development process as was the case herein Plfts. Ex. 27, S 1607.5(a), A. 1430; Davis v. Washington, supra.

2. The scope of the 34-944; the use of a multiple choice test; and the assignment of unit weights of one to each of the five subtests.

As noted the scope of examination No. 34-944 was proposed at the scope conference consisting of subject matter experts and test constructors (Plfts. Ex. 9, A. 1337) and approved prior to its publication in the examination announcement (Plfts. Ex. 17, A. 1355) by Deputy Commissioner Quick. See discussion ante, p. 65-67. While it is true that the subject matter areas were similar to past examinations although it will be recalled that "understanding written material" was deleted

and Report Preparation added; the subtest descriptions and K, S & A statements were generated especially for 34-944; the weight of the law subtest was different from the last Sergeant examination; and all items were new.\* Mr. Siegal did not recall reviewing, much less adopting, prior subtest descriptions and K, S & A statements (T. 644, A. 900). Accordingly, his statement that 34-944 was "not the same examination [as the 1970 Sergeant examination] at all" stands unrefuted. T. 533, A. 769. Compare district court opinion p. 33-35.

The entire selection process for 34-944 consisted following steps: candidates were required to have obtained satisfactory performance ratings for the year preceding in order to participate in the written test; passing the multiple-choice written test with raw score of 53 correct answers out of 75 questions; and ranking on the eligible list on the basis of raw score plus seniority and veterans preference credits.

Samuel Taylor and Kenneth Siegal testified that they had considered using supervisory ratings as an additional element on the selection process but they had rejected the idea because of the inadequacy of the present rating system. T. 381-82, 672 A. 617-18, 908. The district court accepted the examiners

\* The formats for the Report Preparation and Supervision subtests had used previously and the levels of difficulty were retained for similar material Plfts. Ex. 3, A. 1322-24.

judgment on this point but we can characterize the use of a multiple choice written test as reflecting a "slavish imitation of earlier examinations" and an "alarming lack of independent thought." District Court opinion p. 33, A. 181. There are two responses to Judge Lasker's statements: first, the continued use of the multiple choice format is evidence that it has been working well in the past, or to the satisfaction of the employer; and second, what viable means could Mr. Siegal have used instead? He had to test in excess of 1400 candidates on at least five subject matter areas under uniform standards, and he had to do it within the framework of a civil service department that conducts hundreds of examinations a year. The record is silent on any serious challenge to Mr. Siegal's choice on this point. Dr. Barrett merely stated that he believed that there was a better way to test report preparation. He suggested that all 1441 candidates submit samples of their written reports and that the reports then be graded for clarity (T. 921, A. 1159). Such a procedure obviously lacks uniform standards which are proper elements of any testing procedure, provides no assurance that any given candidate will be tested as extensively as is appropriate, particularly if we follow Dr. Barrett's suggestion to the letter since the candidates would be submitting Correction Officer reports to obtain the

Correction Sergeant job; and is frankly overwhelming in its sheer impracticability. Notably, while the district court criticized the multiple choice test, it did not approve Dr. Barrett's suggestion for Report Preparation, and indeed, provided no indication of what choice would have constituted a better choice for Mr. Siegel to make.

The five subtests and related K, S & A were each assigned a unit weight of one based on the fact that each subtest contained fifteen items. This was a clear, affirmative choice made by Mr. Siegel and his assistants and concurred in by Deputy Commissioner Quick (T. 490, A. 726) as well by the three line officers who were aware that the subtests were to have 15 questions each.

The fact that each subtest and the related K, S & A had equal weight is not evidence to the contrary. Mr. Siegel deliberately reduced the law subtest to a unit weight of one by making it one half the size it had been on the 1970 Sergeant examination (T. 573, A. 809). Similarly he double weighted the Methods section on Lieutenants' written test which

was developed substantially contemporaneously with 34-944.

(T. 534-535, A. 770-71).\*

It was not disputed below that the weights assigned to the subtests are properly determined on the basis of judgment, and that that judgment is best made on the basis of cooperation and consensus among test constructors and subject matter experts. (T. 572-74, A. 808-10). This was in fact done with respect to 34-944. There was no suggestion by plaintiffs' witness or by their expert that the weights used were in fact wrong, or if they were wrong, how they should have been changed.

3. The development of the items and the degree of competence or level of difficulty required.

As stated, the items on the Law, Methods and Judgment Subtests were developed with the direct participation of the three line officers from Corrections. The Supervision and Report Preparation items were developed by the cross-occupational

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\* The district court's reference to Mr. Siegal's testimony as stating that equal weights were used because subtests of 15 items allow for certain reliability computations is apparently a misapprehension. District Court opinion p. 34, A. 182. As appears from his actions, Mr. Siegal was aware of how to change the subtest weights and did in fact do so with respect to 34-944. The point of the testimony cited by the court (T. 566, A. 802) was that if you were going to increase or decrease weight, it was Department policy to work in units of 15 items.

skills unit in the Department of Civil Service. All the items were reviewed by the Deputy Commissioner Quick after he approved the inclusion of the subject matter areas and by Mr. Siegal as well. Both procedures therefore had subject matter input, were competent for their purposes, and passed both plaintiffs' and defendants' experts without criticism. See discussion ante, pp. 65-73.

Within the content validation process, two additional matters are germane to item development: the "degree of competence required in regard to each skill" (opinion p. 2, A. 172 citing Vulcan, 360 F. Supp. at 1274) and level of difficulty. The first area was cited by the district court but not discussed in its opinion; evidence was taken on the second area at trial, but it is not referred to in the opinion. Defendants submit that both areas are in fact one and the correct question is whether the level of difficulty of the items is appropriate to the job being tested for.\* The question in turn requires two inquiries: was the level of the material properly assessed initially and how did it operate on the candidate pool. Both inquiries must be answered in favor of 34-944.

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\* If Judge Weinfeld intended a different line of inquiry by his statement in Vulcan, defendants are not aware of any professional standards available in the record in this case, from which his meaning may be elaborated.

As with other segments of the content validation process, the determination of the appropriate level of the material to be included on the test is made initially as a matter of judgment. Herein, the combined judgment of subject matter experts and test constructors is obvious on the Laws, Methods and Judgment subtests. (T. 552, 771, A. 788, 1007). With respect to the Supervision and Report Preparation subtest, the judgments were made initially by the cross-occupational skills unit and Mr. Siegal, and later approved by Commissioners Preiser and Quick. It is apparent from reference to the subtest descriptions that these judgments were made on the basis of the fact that Sergeant was a "first line" supervisory position; that a substantial amount of report writing and reviewing was required; and that material at the same difficulty level had worked well with candidate groups in related titles. Plfts. Ex. 8, A. 1335, 1336; Plfts. Ex. 3, A. 1322-24.

The item statistics generated after the administration show that the judgments for all subtests were correct. Defts. Ex. H, A. 1696-1725. As Dr. Taylor testified, on the basis of the item statistics, the level of difficulty was "good" for the candidate pool, the only group from which appointments could be made. (T. 818-821, A. 1854-57). Dr. Barrett took no exception to Dr. Taylor's remarks and indeed did not review either the item

difficulties or any of the item statistics. (T. 992, A. 1229). Accordingly, Dr. Taylor's opinion must stand.

#### 4. The Pass Point

The pass point on the written test was set at 53 correct answers or 70% of the material (75 questions). This determination is properly a judgmental one and was made at conferences where the Department of Correctional Services was represented. Plfts. Ex. 10, A. 1342. As the district court correctly stated, the pass point finally agreed upon was the maximum allowed by law (T. 524, A. 760) since that raw score would permit a sufficient number of eligibles to fill the vacancies anticipated by Correctional Services. T. 380, A. 616; T. 1524-27, A. 760-63. In short, under the pass point adopted, Correctional Services obtained an eligible list of candidates who were the most knowledgeable about the job being examined for that it could. If the pass point had been lowered or abandoned entirely, the resulting eligible list would simply be longer and contain the names of decreasingly less knowledgeable candidates who would not be reached for appointment. The establishment of a pass point in this manner is entirely consistent with professional standards. (T. 837, A. 1073). As the APA stated in its amicus brief in United States v. Georgia Power Co., supra, at p. 22:

Whatever the level [of the cutting score] there should be a defensible reason. The cutting score might be defended in terms of the minimum score necessary to assure an adequate flow of new employees, or in terms of levels of mastery. (Emphasis added).

In concluding the examination of the content validation process, it is necessary to consider the competence of individuals who were chiefly responsible for its execution. See district court opinion pp. 29-32, A. 177-180. As Dr. Taylor correctly observed, "even. . .a good process does not always guarantee that the end product will be a good product." (T. 810, A. 1046). See also T. 810-814, A. 1046-74. Accordingly, it was necessary for the district court, as trier of fact, to evaluate the competence of at least those individuals who played a major role in the test development process for 34-944. To the extent that the district court sought to evaluate these competences, it omitted consideration of Deputy Commissioner Quick entirely and erred in its assessment of the other individuals.\* District

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\* It is in this context, and only in this context that Dr. Taylor remarked that the content validation process described to him if in fact followed "constituted steps necessary but not necessarily sufficient to the development of a series of job related tests." (T. 809, A. 1046) See District court opinion p. 37, A. 185. The reference to "necessarily sufficient" meant that Dr. Taylor was not prepared to assess the competence of the test constructor (except to the extent that he later testified that 34-944 was a competent measuring device, T. 816-823, A. 1052-59) and/or the subject matter experts, not that some step in the process was missing. The point is made in clear subsequent questioning.

Q. [Mrs. Gordon]. You said "sufficient." Do you mean by that you would have to assess the competence of the individuals involved in the process?

A. [Dr. Taylor]. Yes.

court opinion, id.

As appears from our earlier discussion, Deputy Commissioner Quick and Hylan Sperbeck, both for himself and as a representative of the line officer group, were the major participants for Corrections. Mr. Siegal was principally responsible for Civil Service. Kate Tang and John Decker in the cross-occupational skills unit at Civil Service were responsible for the Report Preparation and Supervision subtests respectively.

Although not referred to by the District Court, both Deputy Commissioner Quick's personal qualifications and his qualifications as a subject matter expert appear at some length in the transcript. Deputy Commissioner Quick literally worked his way up through the ranks. Over a period of 18 years, he served as a Correction Officer, Sergeant and Lieutenant, and was assigned to practically all the posts in those positions T. 441-444, A 677-80. He was employed by the then Narcotic Addiction Control Commission for four years as a facility director at Mid-Hudson, Arthur Kill, Brooklyn Rehabilitation Center and Raybrook. He started the first Department of Correctional Services drug counselling program for inmates in 1965 at Green Haven. T. 448-449, A. 684-85. Although he has no college degree, he has taught courses at Dutchess Community College in correction law and drug abuse as well as "in-service" courses

(to Corrections employees) in supervision and human relations. T. 448-451, A. 685-87. He has represented both NACC (now DACC) and the Department of Correctional Services at professional meetings. T. 451, A. 687. He was appointed Deputy Commissioner in April of 1972 (T. 451, A. 687). In that position, he is in charge of the 19 correctional facilities within the Department, i.e. "facility operations", and responsible for custody, security, control of inmates, inmate discipline, inmate care, visiting program, liaison committees and related matters. (T. 441, A. 677). Between the time of his appointment and the date of his testimony, July 25, 1973, he had made the rounds of the major facilities and had been back to "some of them" "two, three, four times" although not on the weekly basis he had hoped when he was appointed. T. 478-479, A. 714-15. The Deputy Commissioner also testified to what he believed to be the principal functions and responsibilities of a Correction Sergeant. T. 479-480, A. 715-16. Neither Commissioner Quick's qualifications nor the substance of his testimony was challenged by plaintiffs, and defendants believe it beyond cavil that Commissioner Quick had an appropriate level of knowledge about the Sergeant job in the context of the Correction Officer series and that he must be taken as a competent subject matter expert.

Hyland Sperbeck also worked his way up through the ranks. He started as a Correction Officer at Green Haven in 1957, was promoted to Sergeant in 1970, to Lieutenant in January 1972 and to Captain in February 1973 (T. 738-739, A. 973-74). He worked with narcotics addicts at Woodburne (under the jurisdiction of NACC) and in the narcotics unit at Green Haven. T. 738, A. 974. In March of 1970 he took over command of the Correction Officer Training Academy, presently located in Albany, and continued in that position down to the date of the trial. T. 738, A. 974. In that position, as a Captain at the time of trial, he had responsibility for training of new Correction Officers during their probationary terms at the Academy (3 month program) and for "in-service" training program offered to all personnel at the facilities (52 hours in 1972; 32 hours in 1973). T. 751-752, A. 987-88. Captain Sperbeck was called to full field responsibility when there was unrest at Green Haven (five or six weekends) and during the Attica riots (4 days) T. 739, A. 975; T. 764, A. 1000. He had visited every institution in the Department except Attica, Auburn and Elmira in his training position in the approximate 7 month period between January 1, 1973 and the date of his testimony. T. 764, A. 1000.

The district court found that Captain Sperbeck's competence as a subject matter expert was "greatly undercut" by the fact that he had little field responsibility as a Sergeant since 1970 and that his service as a Lieutenant and Captain had been limited to the training programs. Defendants submit that this finding was not warranted and, indeed, it is the contrary inference that is warranted. It is obvious Captain Sperbeck was placed in command of training because the Department believed he was an excellent officer and Sergeant. In that position he is responsible for training new Officers whom Sergeants supervise as well as training Officers, Sergeants and Lieutenants in the "in-service" program. He develops and approves the curricula for these programs, e.g. Defts. Ex. D, A. 1497 and T. 752-755, A. 988-91, and is in regular contract with the facilities (T. 764, A. 1000). On the basis of these activities, defendants believe that Captain Sperbeck must be viewed as a person who knows the Sergeant job as well as other line titles, and in view of his training position, would probably know it as well if not better than anyone in the Department.

Kenneth Siegal, the personnel examiner responsible for 34-944, held in Bachelor of Science Degree from Rennselear Polytechnic Institute and was pursuing a Masters Degree in Educational Psychology and Statistics at SUNY when he undertook 34-944.



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an attack. Dr. John H. and Mrs. Ruth Estes (Baptist) have a church on the west side of the town. The Rev. Dr. W. A. McCall, a native, was related to the founders of the town and the first pastor of the First Free Methodist Church in Pittsburgh, Pa., in 1813.



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8. Maintaining the working continuity, military and safety procedures

9. a) Reservation of right posts, about 1000, to be used in case of emergency, in accordance with Office-Post Article 21
10. b) Organizing the posts in the area in accordance with performing a bin plan in problems relating to the same can be  
c) Make use of facilities in the area of intervention  
when in the event of a raid (air襲撃) or similar
11. Participating in joint exercises at the time a) Doing fire, first-aid, rescue, etc.
12. b) Organizing the posts in the area in accordance with performing a bin plan in problems relating to the same can be  
c) Make use of facilities in the area of intervention  
when in the event of a raid (air襲撃) or similar

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pes of results could obtain from the comparison of the subtest job tasks with the duties statements job tasks germane to the job-relatedness of examination no. 34-94

a job task is found on both the subtests and duties statements, a direct correspondence between the test and the job. Such a correspondence would have to be considered as showing the job-relatedness of that portion of the test (I.e. If all duties statements job tasks were in this category, then we would conclude that the test covered every job).

2) If a job task were only found on the subtests, it would be that portion of the test was not tested. I.e. it would be similar to vacuum, where the entire subsector of the examination had no relationship to the job.\*

3) If a job task is or on the duties statements, it means that that portion of the job was tested for and the question was as to whether or not the issue was significant.\*\*

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\* As shown on the chart at Appendix 2, no such situations were found.

\*\*The job tasks which come within category 3 are listed on the bottom third of the chart at Appendix 2.

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T. 493, A. 729. He held the competitive promotional titles of Senior and Associate Personnel Examiner (Defts. Ex. A, A. 1437-1490) during the course of the test development process T. 493, A. 729.

He prepared the 1972 Correction Officer and Captain examinations,\* and a local corrections examination. T. 518, A. 754. He visited Cocksackie and Matteawan with respect to Correction Sergeant and related titles T. 519, A. 755; T. 540, A. 776. He visited the training academy and consulted with supervisors there about the Sergeant job among others. T. 521, A. 757. He read the series of class specifications (e.g. Plfts. Ex. 4, A. 1327), T. 521-522, A. 757-58, the Occupational Survey materials, Defts. Ex. E, A. 1516, T. 519-520, A. 755-56, past Sergeant scopes and tests, T. 530-531, A. 766-67, and had read various texts, guides and training materials, including the Manual of Correctional Standards. Perhaps most significantly he had three line officers available to him throughout the test development process and could seek advice from them on any point that was not clear to him as well as use them

\* Plaintiffs originally challenged the 1972 officer examination but withdrew that challenge at trial. T. 8, A. 255.

directly for the generation of the subtest descriptions and items on the Law, Methods and Judgment subtest. On the basis of this information, defendants submit that Mr. Siegal was sufficiently knowledgeable about the Sergeant job to undertake the principal responsibility for constructing examination no. 34-944, and the district court should have so found. Indeed, defendants submit that Mr. Siegal was well on his way to becoming a subject matter expert and that his input on that side of the test development process was therefore not to be lightly regarded. Mr. Siegal's competence to construct measuring devices is established by the fact that he did so successfully. See Subpoint B, post.

The qualifications of the two other line officers Lieutenant Cuiros and Captain Harris were not placed directly in issue since they did not testify although they generally appear in the transcript. Mr. Decker and Mrs. Tang from the cross-occupational skills unit also did not testify. Their failure to testify was not by the choice of the defendants but rather necessitated by the constraints of time imposed by the district court and the need to have the most important witnesses testify during the time allotted. Defendants' counsel made it clear to Judge Lasker in a robing room conference immediately following the trial that defendants wished to

establish the qualifications of Cuiros, Harris, Decker and Tang for the record. After a series of suggestions, it was defendants understanding that the court would allow supplementation of the record by the filing of resumes for those individuals subject to the objections of the plaintiffs. The resumes were in fact filed including an additional one for Mr. Siegal which was requested by the court as Dfts. Exs. GG through LL. Plaintiffs objected, and defendants thereafter requested, in substance, that the plaintiffs and the court advise in what form the documents would be accepted or, in the alternative, that the court reopen the proceedings for the taking of additional proof. No answer was forthcoming. The letter of defendants' attorney to the court, dated September 11, 1973, in response to plaintiffs objections, and the several resumes are reproduced at Appendix 1 hereof.

B. Examination No. 34-944 was a competent measuring device as were each of the five subtests.

Applicable professional standards require that an examination be a competent measuring instrument. The EEOC Guidelines § 1607.5(a) require that content valid tests be "well-developed". Plfts. Ex. 27, A. 1432 See p. 53 ante. Dr. Barrett testified (T. 884, A. 1122):

In addition [to an appropriate process for generating a content valid test] a test should always meet some technical requirements of excellence. There are determined by item analysis as was described before [by Mr. Siegal], by determining the reliability of the test, the difficulty of the test, by weeding out items that are either to easy or too hard or which item analysis shows to be ambiguous.

Dr. Taylor agreed with Dr. Barrett on this point. However, only Dr. Taylor proceeded to make the relevant statistical determinations and on the basis of those determinations found that 34-944 met the "technical requirements" which Dr. Barrett believed to be part of any good test. T. 816-823, A. 1062-59.

The District Court did not address itself directly to the question of whether examination No. 34-944 was a competently constructed measuring instrument. The opinion states (p. 37, A. 185): "As to all subtests, Dr. Barrett testified as to item defects, inconsistencies and irrelevancies with regard to numerous questions. (Transcript at 903-22)". However, Dr. Barrett was clearly wrong. Reference to the transcript pages shows that given Dr. Barrett's conceded lack of subject matter expertise he was largely engaged in an assessment of the face validity of certain of the items T. 902-916, A. 1140-54, a practice

which he considered unprofessional T. 969-970, A. 1206-07.

Dr. Barrett also refers to certain items and subtests as not well constructed. T. 917, A. 1185 (Supervision); T. 918-920, A. 1156-58 (Report Preparation); T. 922-923, A. 1160-61 (Judgment and possibly the entire examination depending on how the question is read). However, a determination of whether an item or subtest is well-constructed depends on the very statistical operations Dr. Barrett referred to in his earlier testimony (T. 884, A. 1122, and E. Taylor at T. 817, 825, A. 1053, 1061), and which he had refused to perform although the information was available to him, i.e. Defts. Ex. H, A. 1690. Accordingly, Dr. Barrett's opinion on this point should be disregarded.

In support of examination no. 34-944 as a competent measure, Dr. Taylor testified that "each [subtest] is a competently constructed measuring instrument" (T. 817, A. 1053). Dr. Taylor calculated each item difficulty and the distribution of correct answers throughout the subtests and found that the "dispersed value" indicated a "good distribution of item difficulty" and thus that the "range of difficulty" was appropriate for the population to which it was administered T. 819-820, A. 1055-56. He found further on the basis of subtest mean scores and hi/lo splits on the multiple choice answers that the variation of the ethnic groups within a given subtest was considerably less than the variation of the ethnic groups across the test, thereby

showing that 34-944 was an equally competent measure for both Blacks and Whites T. 821-823, A. 1057-59. In sum, the five subtests are "good tests of what they test." T. 823, A. 1059.

Mr. Siegal testified that the reliability of the examination as a whole was .75 (Spearman Brown), a lower bound, and well within professionally acceptable limits. T. 713-715, A. 949-51. See also testimony of Dr. Barrett at T. 989, A. 1226, stating that an appropriate level of reliability answers the question of whether the test constructors have succeeded in creating a "stable measure".\*

On the basis of this proof the district court was obliged to find that examination no. 34-944 was a well-developed or well-constructed test both in its entirety and as to each subtest. This finding should then have been combined with a favorable assessment of the test development process and of the competence of the individuals involved and defendants found to have met all applicable legal and professional standards.

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\* We note that Mr. Siegal's abilities to construct measuring devices are established as professional and competent on the basis of his success in creating an examination that meets all the requisite statistical tests for quality. The district court's characterization of his participation on the test development side as "unprofessional" becomes all the more remarkable in light of his demonstrated professional skill in this area.

C. Examination No. 34-944 was job-related even if it was not content valid.

Even if defendants did not succeed in demonstrating the content validity of examination No. 34-944 through their presentation of the test development process, the district court was obliged to proceed to the other end of the "sliding scale" and consider whether 34-944 was nonetheless job-related. Vulcan, 490 F. 2d at 394 and 360 F. Supp. 1276-1277.

Although defendants burden of proof is an onerous one since they may be obliged to prove their case by "convincing" evidence, Vulcan, id., such evidence is available in the trial record herein.\*

Common sense dictates that although the test development process might be determined to be inadequate as a validation

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\* The necessary implication of the "sliding scale" approach adopted in Vulcan, id. and followed below (opinion pp. 21-23, A. 169-71) is that there is no need to go from the validation end of the scale which raises an inference of job-relatedness to the other end of the scale where only convincing affirmative proof will suffice. One may stop somewhere in the middle and require simply the establishment of the probability of job-relatedness on the basis of all of the evidence. Defendants respectfully submit that such a standard should be applied herein where there was in fact a coherent test development process which plaintiffs' expert agreed was "correct" in its "general outline" but missing some "detail". T. 895, A. 1133.

strategy, the job information generated during the course of that process and the manner in which it was translated into an examination would be at least be some evidence of the job-relatedness of the resulting examination. Accordingly the discussion in subpoint A about the materials, events and understandings that made up the test development process becomes relevant to the question of the job-relatedness of examination 34-944, and therefore that discussion is incorporated by reference in this subpoint. We may then follow Dr. Barrett's advice and, on the basis of additional evidence in the record, "look at the test itself, and compare it with the job." T. 884, A. 1122. In this case, the comparison of the "test" with the job can be done in two ways: 1) by comparison of the subtest descriptions and related K, S & A statements\* for examination no. 34-944 (Plfts. Ex. 3, A. 1322-24; Plfts. Ex. 8, A. 1332-36) with the

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\* The subtest descriptions have been selected as the appropriate unit for comparison for the following reasons: The subtests, not the items, are the building blocks of the test, and the proper focus of attention, i.e. the "sample" of K, S & A's tested for is expressed in the subtest description and the K, S & A stated therein can only be properly tested by a "constellation" of items. (T. 808, A. 1044); and the fact that items do reflect the subtest descriptions and the K, S & A stated there was not challenged below. Moreover, since the subtest descriptions were the "product" of the job analysis process, to the extent they are consistent with additional evidence in the record, the quality of the job analysis is likewise reinforced.

testimony of the witnesses who talked about the content of the Sergeant job; and 2) by comparison of the subtest descriptions and related K, S & A statements for 34-944 with the Correction Sergeant duties descriptions (Defts. Ex. R., A. 1785-1930) which describe the Sergeant job at the various facilities' posts and were generated independently of the test development process for 34-944. On either or both comparisons, it appears that there is no significant area of the Sergeant job that could have been tested for on 34-944 that was not in fact tested for.

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The following list states substantially all the Sergeant activities that were testified to:

1. Writes reports frequently and prepares charts T. 48, 225, 280, A. 295, 462, 517.
2. Supervises subordinates (CO's) T. 61, 218 A. 308, 455
  - a. Sees that activities in his particular area run smoothly T. 61, 218, A. 308, 455.
  - b. Sees that CO's conduct themselves properly and do their work T. 61, 218, A. 308, 455.
3. Must deal with critical situations. T. 117, 219, 480, A. 354, 456, 716.
4. Transport inmates outside of facility T. 124, A. 361.
5. Solve problems regarding inmates T. 124, A. 443.
6. Instruct and counsel CO's T. 253, A. 490, discipline CO's, explain new policies T. 479, A. 715.
7. Make assignments to CO's T. 280, A. 517.
8. First aid T. 308, A. 545.
9. Be alert to security precautions T. 479, A. 715.
10. Disciplining of inmates T. 479, A. 715.
11. Make investigations T. 479, A. 715.
12. Supervisor in charge of shift T. 280, A. 517.

If we then compare the listed activities to the subtest descriptions and K, S & A statements we find that only the giving of first aid is missing. This area was testified to by Henry Liburd, a Correction Officer at Wallkill, a medium security facility. Mr. Liburd had never been a Sergeant and his statement that "first aid" was a "major part" of his job (T. 308, A. 545) is of dubious relevance to a Sergeant test for that reason and for the additional reasons that he worked at one of the less dangerous facilities in the system and that none of the other witnesses who had been either provisional or permanent Sergeants considered it a "major part" of their jobs. Moreover, even accepting Mr. Liburd's statement as correct for himself, Dr. Taylor pointed out no test is expected to cover all of the behaviors composing the job in question T. 806-807, A. 1042-43.

In order to facilitate the comparison between the 14 job tasks on the subtest descriptions and the job tasks on Sergeant duties statements (Deft. Ex. R, A. 1785-1930), defendants have prepared a chart which lists the 14 subtest tasks in the left hand column and then correlates (or illustrates lack

of correlation of) those tasks with the job tasks culled from the duties statements\*. The chart is set forth at Appendix 2 hereof. Since the duties statements do not use the exact language found in the subtest descriptions it was necessary to classify the tasks listed in the duties statements under the appropriate subtest headings where possible.\*\*

The procedure followed is thus based on inspection of the duties statements and common sense classification. However, defendants submit that substantially identical results will obtain if a different means of comparison is adopted.

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\* The Sergeant duties descriptions were prepared at the facility level by Department of Correctional Services line employees including plaintiff Hayes. They were reviewed by supervisory personnel within the facility and by Deputy Commissioner Quick's unit. They are accurate and up-to-date. T. 444-445, A. 680-81; T. 468-475, A. 704-24; T. 476-478, A. 712-14; Defts. Ex. Q., A. 1783, Defts. Ex. R., A. 1785, T. 488-489, A. 724-25.

\*\*The classification method is illustrated in the Note following Appendix 2.

Three types of results could obtain from the comparison of the subtest job tasks with the duties statements job tasks that are germane to the job-relatedness of examination no. 34-944.

- 1). If a job task is found on both the subtests and duties statements, a direct correspondence between the test and the job is shown. Such a correspondence would have to be considered as showing the job-relatedness of that portion of the test. (I.e. If all duties statements job tasks were in this category, then we would conclude that the test covered every job element).
- 2). If a job task were only found on the subtests, it would mean that that portion of the test was not job related. I.e. it would be similar to Vulcan, where an entire subsection of the examination had no relationship to the job.\*
- 3). If a job task is only found on the duties statements, it means that that portion of the job was not tested for and the question would arise as to whether or not the omission was significant.\*\*

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\* As shown on the chart at Appendix 2, no such situations were found.

\*\*The job tasks which come within category 3 are listed on the bottom third of the chart at Appendix 2.

On the basis of the comparisons shown on the chart, we may conclude as follows:

- 1). Every task that is found at more than one post at 2 or more facilities is included in the subtest descriptions.
- 2). Every task that was found at at least, 10% of the posts is covered in the subtest descriptions.
- 3). At least 70% of the tasks at any facility are covered in the subtest descriptions (average coverage: 88%).
- 4). At least 77% of the posts have all of their tasks covered in the subtest descriptions.
- 5). There are 881 task-post pairs of which 857 were covered by the test or 97%.

Reference to those duties statements job tasks that were not covered in the subtest descriptions shows that they are of minimal frequency across the facilities and of obviously minimal substance. Appendix 2, bottom third.

The District Court concluded its opinion by stating that perhaps the most serious defect with respect to the job-relatedness of the examination was that "regardless [of] whether 34-944 adequately tests the attributes it is intended to measure, it fails to examine a number of traits, skills and abilities which witness for both sides singled out as important

to the Sergeant job. Among these are leadership, understanding of inmate resocialization, ability to empathize with persons of different backgrounds, and ability to cope with crisis situations (Transcript at 63-64, 117, 308, 702-703)." Opinion p. 38, A. 186. This statement is erroneous with respect to 34-944. The examination in fact tests for knowledge in all the areas cited by the court except empathy.\* For example, Deputy Superintendent Ryder spoke of leadership in terms of the Sergeant's supervisory relation to the Correction Officers under him (T. 64, A. 31). The subtest description for Supervision as well as the job tasks "enforcing proper performance of duty", "advising Correction Officers on duty" and "assigning Correction Officers to posts of duty" found in the Law, Methods and Judgment subtests amply cover his point. Provisional Sergeant Suggs' belief that the test did not cover critical situations (T. 117, A. 354) is met by the use of a situational judgment subtest and by the "preventing disturbances and escapes" and "making rounds to oversee security procedures" job tasks.

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\* The examination did include a question on knowledge of the religious practices and mores of the Muslims T. 981-984, A. 1218-21. The question was criticized by Dr. Barrett because he apparently confused knowledge of the mores of a minority group with having empathy or sympathy for that group.

Correction Officer Liburd's comment that human relations and resocialization were not covered (T. 308, A. 545) is met by the "participating in inmate rehabilitation" and "referring inmate needs to appropriate authority" job tasks.

Mr. Siegel's comments on attitudes are, defendants believe, at the heart of the district court's finding of omissions. Mr. Siegel testified (T. 702-703, A. 938-39):

"Q. [Mrs. Greenberg] Mr. Siegal, are there certain personality traits or characteristics the possession of which would add to the quality of a person's performance as a correction sergeant but which were not tested for on examination 34944?

A. I believe that there are certain so-called personality aspects and behavioral aspects which might relate to the performance of the job of correction sergeant.

THE COURT: And which were not tested?

THE WITNESS: Correct.

Q. I asked you that identical question on page 52 of your deposition. I would like to read your answer which, after a bit of colloquy, is on the bottom of page 53.

'I believe again in my opinion that ability to treat people as individuals, to treat them fairly under all circumstances or close to it, that they can

relate to people of differing backgrounds whether they be cultural, social, ethnic, what have you, things in general of that sort. As I said, being able to treat an individual, an inmate, let's say, as a person, as a man, are things that I specifically think of in terms of correction. Again, they are only my own opinion and I have nothing to substantiate that belief.'

THE COURT: I am not quite sure why you read that.

Q. Do you still agree with that statement?

A. I think as a question of personality traits, along those lines, yes."

Defendants do not oppose the position that it is possible that certain traits or attitudes may be job-related. However, the fact that they were not included on 34-944 is not a basis for a finding of defective construction or lack of job-relatedness. First, Mr. Siegal had nothing to "substantiate" his belief and therefore, as a competent test constructor, he could not include an attitudes test on the examination. Moreover, his failure in this regard is not evidence of lack of professionalism since neither expert witness provided the court with any statement of what attitudes, if any, were job-related.

Second, attitude or projective tests of the type apparently contemplated by the Court must be empirically validated to be found job-related at all (T. 825-826, A. 1061-62); and neither expert knew of any empirically validated test that could be used for that purpose (T. 826, A. 1062; T. 941, A. 1178). Both experts also agreed that the development of empirically valid instruments is a long and uncertain course (T. 801, A. 1037; T. 879, A. 1117). Thus, had Mr. Siegal sought to test attitudes, he would have been obliged to use an unvalidated device, and he would not have been able to demonstrate its job-relatedness to the satisfaction of the court. Third, attitude tests are usually used as a screening device, and not as a competitive ranking device. In this sense they would be inappropriate for inclusion on an examination like 34-944. However they do approximate in purpose the practice of requiring a probationary term of all new officers (which candidates for Sergeant must have passed) wherein the officer is closely observed by supervisors and terminated prior to the time he obtains tenure if his attitudes among other matters, are not found appropriate. Termination

and involuntary leave procedures are also available against tenured employees should emotional instability, poor attitudes etc. adversely affect their work (T. 480-482, A. 716-18). Fourth, the Correctional Services provides all its employees with courses in human relations, minority group culture, attitudes and related fields (T. 751-756, A. 987-92). In sum, Mr. Siegal could achieve substantially the same if not better results under existing procedures than he could by administering an unvalidated test on the subject matter the district court had in mind.

POINT III

THE COURT BELOW ERRED IN DEFINING THE CLASS TO INCLUDE THOSE AGAINST WHOM EXAMINATION NO. 34-944 DID NOT HAVE A DISPARATE IMPACT.

The District Court defined the class, for the purposes of granting the panoply of relief herein,\* to include "all Black and Hispanic Correction Officers or provisional correction sergeants who failed 34-944 or who passed but ranked too low to be appointed" (A 187). It erred in failing to exclude from the definition those against whom the examination did not have a disparate impact attributable to racial or ethnic factors. See Castro v. Beecher, 459 F. 2d 725 (1st Cir., 1972).

In cases of this type it is particularly important to take care that the lines defining the class are drawn with precision so as to militate against sweeping so broadly as to take within the confines of the action those against whom no discrimination has been shown. Bradley v. Miliken, \_\_\_\_ U.S. \_\_\_, 42 U.S.L.W. 5249 (7/25/74) cf. Weiss v. Tenney Corp., 47 F.R.D. 283 (S.D.N.Y., 1969); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y., 1968).

\* Compare Bridgeport Guardians, 354 F. Supp. 778, 783 (D. Conn., 1973); Vulcan, 360 F. Supp. at 1266 n. 1.

It is in this regard that the facility effect factor becomes a salient one. And it is in this regard that the District Court, despite its recitation of the Rule 23 criteria, erred in failing to factor out those against whom any disparate impact was not a product of race or racially identified characteristics. Compare, in this regard Bridgeport Guardians v. Bridgeport Civil Service Comm'n., supra, 354 F. Supp. 785-6; Castro v. Beecher, supra. Thus, while factors such as education and cultural heritage have certain impermissible racial/ethnic overtones, the facility effect is a product of choice or accident, and is not racially oriented.\* See Rios v. Enterprise Association Steamfitters

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\*In this regard Bradley v. Miliken, supra, is instructive. There the Court, in reversing a circuit court three county desegregation plan, underscored the importance of properly identifying the scope of discrimination and factoring out non-discriminatory disparateness. In failing to eliminate or account for the facility effect, where 80% of the Black candidates were located at Ossining and 85% of the white candidates were located at other facilities, the Court included within the class of plaintiffs those against whom the examination did not discriminate.

Lcl. No. 638, 501 F. 2d 622 (2d Cir., 1974). There the Court, construing § 703(j) of the 1964 Civil Rights Act recognized that a racial imbalance not attributable to discrimination is not a wrong warranting relief.

As has been shown in Point I, if the facility effect is factored out of the equation, the only instance where plaintiffs have established a prima facie case or signalled the District Court's further "inquiry into the causes accounting for pronounced racial identifiability" Miliken, supra, 41 L. Ed. 2d n. 19 at 1089 is between Whites and Blacks at Ossining Correctional Facility. At other facilities between Whites and Blacks and between Whites and Hispanics, there were no significant differences in passing rates. Consequently, at the passing rate level, which plaintiffs urge as determinative, there was no discrimination, no constitutional violation and therefore no cause of action accruing to the minorities thus described.

To include them within the class, therefore, would be a perversion of the theory of class actions, for it would permit a procedural convenience to create a cause of action where none would otherwise exist. Eisen v. Carlisle &

cp

Jacqueline, 479 F. 2d 1005 (2d Cir., 1973).\*

Even assuming arguendo, that the failure to account for the facility effect is not error, to include within the class persons who passed but ranked too low to be appointed was necessarily a speculation and therefore was over-inclusive with respect to that subgroup. It is entirely unclear that there is such a class, and even assuming that such a class exists, who its members are. Consequently, it does not constitute a proper class, and therefore, plaintiffs who, under no theory, are members of such a class, if one exists, cannot be heard to complain on its behalf. Weiss v. Tenney Corp., supra; Dolgov v. Anderson, supra; Eisen III, supra.

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\* The proper and precise definition of the class is more than an affinity for orderliness in the law, it has rather, in addition, an effect on the nature of the proof to be adduced and considered, for the scope of plaintiff's claims determine the burden of defendant's proof. Moreover, consonant with Miliken, supra, definition of the class has a controlling effect on the scope of the relief for the relief cannot exceed the wrong to be remedied. See Point IV, infra.

POINT IV

THE DISTRICT COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN GRANTING THE RELIEF PROVIDED FOR IN THE ORDER AND DECREE OF JULY 31, 1974.

Summary of Argument

The District Court, in its final order and decree of July 31, 1974, granted comprehensive relief to plaintiffs, members of their class, and others not members of the class and who at best, had a tenuous connection to the instant action. The Court enjoined the use, for any purpose, of the invalidated examination; mandated the creation of a new selection device to be criterion validated, if feasible, coupled with a preferential quota or goal mandating a 1:3 appointment ratio until such time as exact parity is reached with the underlying Correction Officer title.

Defendants urge, that even assuming arguendo the District Court was correct in finding plaintiffs' constitutional rights were violated, the relief granted by the court was error both as a matter of law and an abuse of discretion. Specifically defendants' urge that the District Court erred and abused its discretion in directing defendants to criterion-validate the

final selection device "if feasible", where in a constitutional case, as this is, defendants' burden is limited to only demonstrating job-relatedness; that the District Court abused its discretion in refusing to permit those provisional Correction Sergeants appointed prior to the July 31, 1974, to be permanently appointed to the position, where such appointments would not adversely affect subsequent additional minority group appointments and where the equities were in favor of such appointments; that once the Court refused defendants' suggestion for a limited utilization of the 34-944 list, and therefore annulled the examination, it erred in imposing preferential minority quotas with respect to either or both the interim and final selection procedures in the absence of any cognizable proof of discrimination or disproportionate impact resulting from examinations prior to 34-944; that even assuming arquendo that the facts warranted the imposition of a preferential quota or goal, it abused its discretion in continuing such goals or quotas until absolute parity between the Sergeant title and the underlying correction officer title is reached; and lastly, the District Court erred in enjoining defendants from terminating or otherwise interfering with the provisional appointments of plaintiffs and certain other members of the class in the absence of any proof that those individuals were better qualified than either white or other minority individuals.

A. The requirement for a criterion-validated final selection device

The final order and decree of the district court states in part (A. 242-3):

"3. The defendants, their agents, employees, and successors in office, are mandatorily enjoined to develop a lawful non-discriminatory selection procedure for the position of Correction Sergeant (Male). In so doing, they shall adhere to the following general guidelines:

\* \* \*

(c) All validation studies pursuant to this decree shall be performed by means of empirical, criterion-related validation techniques insofar as feasible."

In so doing the District Court has imposed what appears to be a new constitutional requirement neither required by any decision nor specifically approved as a mode of relief by this Court. Defendants' constitutional obligation with regard to selection devices is that of job-relatedness. Griggs v. Duke Power Co., 401 U.S. 424, 431\* (1971). While both this Court and the EEOC Guidelines have indicated that criterion-related validity is a preferred mode, this Court has been specific in refusing

\*There the court wrote, in the context of a Title VII case: "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

to mandate that such a validation strategy (or indeed any validation strategy at all) is constitutionally required.\* Job-relatedness, the appropriate constitutional standard means only that the selection device used to make employment decisions measures a person's ability to perform the job, not the person in the abstract. Thus, to meet this requirement defendants need only show that the knowledges, skills and abilities tested for fairly match the content of the job. As Judge Weinfeld defined it in Vulcan, 360 F. Supp. at 1272:

"A job-related examination is one that accurately tests the capacity of the applicant to do the job for which he is applying, or is 'reasonably constructed to measure what it purports to measure'." (Emphasis added).

That validation is not a constitutional pre-requisite to show job-relatedness is shown by this Court's decision in Vulcan, supra. The Court there wrote, in language adopted, but not applied, by the Court below in the instant case (490 F. 2d at 396):

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\*In this regard it is interesting to note, as will be dealt with more fully, infra, contrary to this Court's "preference" or hierarchy of validation strategies the APA Standards (PX 26, A. 1415-1416) eschew any such preferential mode of validation, recognizing that the nature of the examination usually determines what form of validation strategy is most appropriate.

"As we read his opinion, the [District] judge developed a sort of sliding scale for evaluating the examination, wherein the poorer the quality of test preparation, the greater must be the showing that the examination was properly job-related, and vice versa. This was the point he made in saying that a showing of poor preparation of an examination entails the need of 'the most convincing testimony as to job relatedness'. The judge's approach makes excellent sense to us. If the examination has been badly prepared, the chance that it will turn out to be job-related is small. Per contra, careful preparation gives ground for an inference, rebuttable to be sure, that success has been achieved."

See Chance v. Board of Examiners, 458 F. 2d 1167, 1173 (2d Cir., 1972); McDonnell-Douglas Corp. v. Green, 411 U.S. 792, n. 14 at 802 (1973); Bridgeport Guardians v. Bridgeport Civil Service Comm'n, 482, F. 2d 1333, 1338 (2d Cir., 1973) [not significantly job related].

Having established that the appropriate constitutional standard is one of job-relatedness, a standard that may be met by showing that the examination has been validated, is valid by one or more of the validation strategies or is, in fact, job-related, it follows that the Court, in granting relief, cannot

require defendants to do more, no matter how professionally satisfying, than the constitutional minimum. The appropriate remedy for a constitutional wrong of this sort is to require the authorities conduct a new examination free from "constitutional taint" 360 F. Supp. at 1278. While a requirement of validation may be sensible as a professional-psychological approach, the state of the law is such that a requirement to validate is in excess of the District Court's jurisdiction, even on the equity side. See Miliken v. Bradley, \_\_\_\_ U.S. \_\_\_\_ 42 U.S.L.W. 5249, 5258:

"The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional wrong."

The constitutional wrong in this case was the use of a non-job-related selection device having a disparate racial/ethnic impact. The remedy must be to construct a job-related device, nothing more.

Assuming arguendo however, the District Court did not err in requiring defendants to use a validated selection device, it clearly abused its discretion in indicating a preference for criterion related validation.

In directing defendants to criterion validate the selection device, "if feasible", the District Court while parroting the language of the EEOC Guidelines (PX 27, A. 1432) 29 CFR § 1607.5(a), failed to take account of both professional opinion and this Court's holdings, indicating that criterion-related validation is neither constitutionally required nor appropriate to all testing situations. The qualification, "if feasible", is insufficient to save this requirement for neither the Court nor the Guidelines define the term "feasible" and thereby furnish a fertile source for future litigation if this requirement is to be exalted to constitutional dogma.\*

Writing for this Court, in Vulcan, supra, 490 F. 2d at 394, 394, Judge Friendly took a critical stance on such exaltation. He stated:

"Plaintiffs insist that the only satisfactory examinations are those which have been subjected to 'predictive validition' or 'concurrent validition', preferably the former.

\* \* \*

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\*As used in the Guidelines the term "technically feasible" is defined as "having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc." (PX 27, A. 1431) 29 C.F.R. § 1607.4(b). Plaintiffs, it is anticipated, will argue that the terms "feasible" and "technically feasible" are synonymous.

The judge wisely declined to insist on either. The Fourteenth Amendment no more enacted a particular theory of psychological testing than it did Mr. Herbert Spencer's Social Statics. Experience teaches that the preferred method of today may be the rejected one of tomorrow."

Yet despite this clear caveat the District Court now mandates that criterion related validity be performed if feasible.

Wholly aside from the constitutional infirmity extant in such a requirement, in so requiring defendants to validate, the court failed to take cognizance of the fact that the APA Standards, incorporated by reference into the EEOC Guidelines, specifically eschew such hierarchy of validation strategy. The Standards state (A. 1416):

"These three aspects of validity are only conceptually independent, and only rarely is just one of them important in a particular situation. A complete study of a test would normally involve information about all types of validity. A first step in the preparation of a predictive (criterion-related) instrument may be to consider what constructs are likely to provide a basis for selecting or devising an effective test. Sampling from a content universe may also be an early step in producing a test whose use for prediction is the ultimate concern."

The Standards further emphasize (Id.):

"It is the intended use of the test rather than its nature that determines what kind of evidence is required."

In the structure of the Department of Correctional Services, the use of the promotional examination is not intended to be an indirect measure but a direct sampling of the content universe to see if a candidate, at the time of appointment possesses the requisite knowledge, skills and ability to be a Correctional Sergeant, for he is expected to be and is immediately operational. Thus the purpose of 34-944 is not simply to predict whether a candidate would make a good or bad Sergeant, but whether, on appointment, he already possesses those knowledges, skills and abilities necessary and pertinent to the Sergeant's duties. In this fashion, unlike aptitude inventories or LSAT's, defendants are not simply attempting to predict the future ability to succeed, but rather like a Bar Examination, they are attempting to measure the candidates relative competence to do the job now. As such, a content valid, as opposed to a criterion or construct validated device, is the most appropriate measure.

Finally the practical and technical problems extant in the creation of a criterion-related valid test are manifold. Judge Friendly, in Vulcan, supra described them (490 F. 2d n. 10 at 345):

"For example, both concurrent and predictive validation are available only when the examination is used before, which raises a serious problem of security. In addition predictive validation requires that the initial sample group be chosen without reference to any potentially discriminatory screening devices. (Truncation of sample). It is only after some period of time that the sample group can be evaluated for job performance, and their performance on the job compared with their performance on the proposed qualification examination. If, after this expensive and time-consuming procedure, the qualification examination proves to be invalid, or of limited validity, the entire process must begin again with another sample group. While concurrent validation is less cumbersome, it is also less trustworthy, since the performance of experienced employees on a proposed qualification examination may be of limited use in attempting to project the performance of new applicants on the job from their performance on a qualifying test. For one thing, highly motivated employees may do

well on an examination after becoming acquainted with the job while they would have done poorly prior to being hired. In addition, both schemes rely on some mode of evaluating the current employee's performance, such as supervisory ratings which are ratings which are in themselves imprecise, subjective and subject to possible bias. Finally, a test that is highly predictive for one group may be valueless as a predictor of job performance for another ... The proposed solution for this problem, 'differential validation,' ... raises 'almost insurmountable problems'....". (Citations omitted).

In light of the foregoing, the District Court exceeded its authority in requiring that the final selection procedure be criterion validated and, in practical terms, ordered a remedy that will create more problems than it will resolve.

B. The District Court erred and abused its discretion in not permitting the provisional Sergeants to be made permanent.

Prior to the final decree in this case, the District Court permitted an arrangement whereby appointments could be made on a provisional basis for those who have passed Examination No. 34-944 (A. 33-37, A. 61-74). In addition, certain members

of plaintiffs' class, holding provisional sergeant positions, were retained in that position.\*

In the final order and decree, the District Court permanently enjoined defendants from (A. 242):

"(a) making permanent or provisional appointments to the position of Correction Sergeant (Male) in the New York State Department of Corrections [sic] based upon the results of Examination No. 34-944 or any eligible list promulgated pursuant to that Examination; and

(b) administering, promulgating eligible lists based upon, or in any way acting upon the results of Examination No. 34-944 for the position of Correction Sergeant (Male)."

In order to understand the fallacy of the order, reference must be made to the purpose of the Equal Protection Clause in the context of employment opportunity. Neither Title VII, nor the Constitution mandate the use of a merit system or that only the best qualified be employed. A State, in other words, may, unless prohibited by the Constitution,

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\* Originally there were ten such minority provisional sergeants. However, soon after the litigation commenced, two of them voluntarily requested that they be returned to their underlying title, and a third (McKinnie) died. Thus, there are not seven such provisionals.

make employment decisions on any basis it deems expedient. The apparent wrong in this case was that the State's basis for making employment decisions had an adverse racial/ethnic impact. In other words, employment decisions were made on a constitutionally prohibited basis. Perry v. Sindermann, 408 U.S. 593, 597 (1972), and cases cited therein. The remedy therefore, is not to mandate a particular employment decision-making process, but to prohibit those aspects, and only those aspects, of the process that are constitutionally invalid. See Vulcan, supra, 360 F. Supp. at 1277; Castro v. Beecher, 459 F. 2d 725, 736-7 (1st Cir., 1972); Carter v. Gallagher, 452 F. 2d 327 (8th Cir., 1971), cert. den. 406 U.S. 950 (1972).

In this case, as is more fully set out in intervenors' brief to this Court, the principles of equity require the finding that the Court erred in not accepting defendants' suggestion that all incumbent provisionals be permitted to remain in the positions that they have served in for a year or more. This limited remedial action on behalf of incumbents would not have injured members of plaintiffs' class as there would have been sufficient openings to cure any significant racial/ethnic disparities without causing any unnecessary or inequitable relocation to the incumbents. There are currently 128 provisional

Sergeants, serving at correctional facilities throughout the State.\* It is anticipated by the Department that forty additional appointments will be made in the ensuing year. Within these forty additional appointments, it is possible to cure any significant racial/ethnic imbalance. Thus, the Court's broad ranging bar on the use of 34-944 was at best gratuitous, and inequitable, resulting in an unnecessary burden both on the Department of Correctional Services, and on the morale of its personnel. Therefore, the Court should set aside this part of the order.

C. The Court having set aside examination no. 34-944, erred as a matter of law and abused its discretion in imposing a preferential coal or quota

The District Court, in addition to having set aside examination number 34-944, and mandating the creation of a valid, non-discriminatory selection device, further required defendants to make appointments on a 1:3 ratio until the racial/ethnic composition of the Sergeant's title matches that of the underlying correction officer title.

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\*These include 7 pre-list provisionals, 83 pre TRO appointees and 38 post-TRO appointees. Defendants Supplemental Affidavit on Relief at 4. Thus over half of the 245 sergeant slots are in danger of being vacated by the Court's decree. That such a substantial dislocation would have a substantial adverse impact on the sensitive operations of the Department of Correctional Services appears obvious. See e.g. U.S. ex rel. Haymes v. Montanye, \_\_\_\_ F. 2d \_\_\_\_ (2d Cir. Slip. Op. 21) (10/4/74).

In annulling examination no. 34-944, the District Court placed itself in exactly that position Judge Weinfeld wished he had been in Vulcan, supra. There the Court wrote 360 F. Supp. at 1278:

"This court is of the view that an examination list which is constitutionally impermissible should be stricken down in its entirety and the authorities directed to conduct a new examination, free from constitutional taint -- that the remedy is not to continue to base appointments on the condemned list but to require executive or administrative officials to live up to their responsibilities and to prepare and conduct an examination consonant with the Fourteenth Amendment."

The Court there further noted the inadvisability of using racial adjustments to save an existing list, except where exigent circumstances otherwise required. 360 F. Supp. at 1278. Where such circumstances existed, the Court held, appointments could be made from the list on some equitable basis.

In the instant case, the record is totally devoid of any cognizable evidence showing a pattern or practice of past discrimination warranting an affirmative action decree. The District Court, nevertheless, took it upon itself to impose upon the State a preferential quota or goal, stating (A. 189):

"The invalidation of 34-944 clearly authorizes the court to grant appropriate affirmative relief, including mandating the creation of a new selection process to conform with the requirements of the Fourteenth Amendment and ordering the promotion of members of plaintiffs' class in a ratio designed to correct the effect of defendants' unconstitutional employment practices."

This is clearly a misstatement of the appropriate standard. As stated by this Court in Vulcan, supra, 490 F. 2d at 398:

"...[W]e approach the use of a quota system 'somewhat gingerly' and approve this course only because no other method was available for affording appropriate relief without impairing essential city services." [Emphasis added].

The District Court recognized that the record is devoid of any evidence showing that minority correction officers have been deterred from taking promotion examinations for the title here in question, and indeed, plaintiffs Kirkland and Hayes had each taken prior Sergeant's examinations each time they were given (T. 152, 230, A. 360, 467). Similarly Young had passed 34-944 and was on the eligible list, as Liburd had passed a previous Sergeant's examination but had not then been appointed (T. 35, 306, A. 282, 543).

Moreover, despite the Court's clearly erroneous statement (A. 181), "there is evidence in the record of this discriminatory impact of earlier tests," this, in and of itself, is insufficient to warrant an affirmative action quota. First, a practice is not "discriminatory" unless there is a showing of a significant disparate impact resulting from it. The evidence before the District Court is devoid of such a showing. There is nothing in the record showing that the ethnic data on Examination No. 34-002\* is in any way reliable, or complete. Even assuming arguendo that the ethnic data is complete, plaintiffs failed to adduce any evidence showing that any disparity was statistically significant. Chance, supra, 330 F. Supp. 210-11. Moreover, the respective pass point analyses show that only 9.5% or 94 whites who took that examination passed it, while none of the 46 Blacks passed and the one Hispanic failed.\*\* Thus, if only four blacks had passed 34-002, they would have been no disparate impact at all. This can hardly be a showing of significant disparate impact.

\*Ex. 17, A. 181; the 1970 examination for Correction Sergeant, p. (10).  
\*\*Ex. 18, A. 181.

Secondly, before a practice can be found to be discriminatory, not only must there be a showing of a disproportionate impact but the users must not be able to show that it was job-related. Vulcan, supra, 490 F. 2d (n. 4 at 391):

"This phrase, used by Judge Coffin in Castro v. Beecher, 459 F. 2d 725, 732 (1st Cir., 1972), seems preferable to 'discrimination' or even 'de facto discrimination', since these terms have acquired a prejorative connotation not warranted in the initial phase of the inquiry. The first endeavor is to ascertain whether the challenged procedure has had disparate effects on particular racial groups. Discrimination in the invidious sense exists only if such effects are not the results of job-related tests."

That the instant case is not a proper "pattern or practice" case, however, is indicated by the District Court's expression early in the trial, that it would prefer to decide this case solely on the basis of examination no. 34-944, the sustaining of objections to discovery on all prior examinations for Correction Sergeant (Male) and the fact that defendants, due to the time strictures imposed upon them by the Court were not able to put in evidence concerning the job-relatedness of prior examinations for the position, though they stood ready to do so (T. 5-7, A. 252-254). In light of the foregoing,

the District Court could not, as it did not, find a pattern or practice of discrimination and without such a finding there was no "past discrimination" to remedy within the meaning of Louisiana v. United States, 380 U.S. 145 (1965), upon which the District Court relied (A. 189). Compare Vulcan, supra, 490 F. 2d at 398 and Rios, supra, 501 F. 2d at 631-2, where the Court stated:

"Applying these principles here, the undisputed facts justified the district court's grant of more drastic relief, than a mere prohibition against future discriminatory conduct on the Union's part. The Court's findings, which are not controverted, disclosed a pattern of long-continued and egregious racial discrimination which permeated the steamfitting industry, precluding qualified non-white applicants from gaining membership in the Union's A Branch and maintaining it as a 'white' union.

\* \* \*

Nor has the Union, despite the opportunity afforded after the issuance of preliminary relief, voluntarily 'cleaned house' or taken any meaningful steps to eradicate the effects of its past discrimination. Under the circumstances the imposition of remedial goals was not an abuse of discretion. [Emphasis added]

Clearly the circumstances referred to in Rios, are not here present, therefore the Court abused its discretion in imposing affirmative relief.

D. The District Court, assuming arguendo, that the facts warranted affirmative relief, abused its discretion in continuing such relief until parity was reached.

The order of the District Court required that the 3:1 preferential quota or goal be continued until such time as parity with the underlying Correction Officer title is reached (A. 243-4). It is urged that in so doing, even if a goal or quota should be imposed, the district court abused its discretion in two respects. First the standard to be employed is not "parity" but rather "significant disproportionate impact" Vulcan, supra, 490 F. 2d n. 4 at 391. Once there is no significant disproportionate minority representation, there is no longer any evil to be cured and no longer any basis for the court interfering with the employment process. Chance, supra, 330 F. Supp. at 214.

In Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 24 (1973), the Court eschewed any concept of a constitutional right to a particular racial mix, whether it be in a classroom, a school system or a job. The Court wrote (Id.):

"If we were to read the holding of the District Court to require as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be forced to reverse."

See also Spencer v. Kugler, 404 U.S. 1027 (1972); and Milliken v. Bradley, \_\_\_\_ U.S. \_\_\_\_, 41 L. Ed. 2d 1069, 1089 (1974) where the Court construed the language in Swann to mean that -

"...dissegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom'." [footnote omitted]

The District Court, thus in requiring exact parity in the Sergeant title with what it apparently believed to be the relevant base population, has violated the rule of construction extant in the Swann-Milliken line of cases, and therefore, as did the District Court in Milliken, abused its discretion. See Harper v. Mayor & City Council of Baltimore, 359 F. Supp. at n. 5 1187, citing 'Castro v. Beecher, supra'.

Moreover, in balancing the equities, to require absolute parity, in effect, requires that appointments be made solely on the basis of a racial classification, further exacerbating the problems extant in any goal or quota decree, the question of morale, the problem of having a sufficient qualified

minority pool, the need for making appointments on a rational non-discriminatory basis have not been considered at all by the Court. Even more importantly, because of the rapidly changing characteristics of the underlying population, (As is shown by the answer to interrogatory 5, PX 3, as summarized in PX 31 (A. 1447)], between January 1, 1973 and May 1, 1973, minority employment in the underlying Correction Officer title increased from 457 to 526 an increase of 15.1% over a four month span. The statistics are shown as follows:

	1/1/73	o/o	5/1/73	o/o	net change
WHITE	3872	89.5	3864	88.3	-1.2
BLACK	362	08.3	395	8.8	+0.5
HISPANIC	95	02.2	131	2.9	+0.7
TOTAL	4329	100.0	4490	100.0%	

Between May 1, 1973 and May 27, 1974, the number of minority employees in the underlying title increased from 526 to 610, an increase of 15.9%, the statistics being:

	5/27/74*	o/o	net change
WHITE	4060	86.9	-1.4
BLACK	447	9.6	+0.8
HISPANIC	163	3.5	+0.6
TOTAL	4670	100.00	

\*See, Supplemental Affidavit on Relief of Judith A. Gordon, sworn to June 24, 1974, n \* on p. 10

As these figures show, defendants if required to maintain parity, even on an interim level, would be placed in the position of being in compliance at one point in time, yet being in violation, through no fault of their own, almost immediately thereafter. Such a situation cannot be countenanced. See Rios, supra, 501 F. 2d at 633.

Assuming arguendo, the District Court was correct in mandating parity with the underlying pool, it nevertheless erred, as a matter of law and abused its discretion in its selection of the pool against which to compare the racial/ethnic composition. In so doing it committed the same error as did the District Judge in Rios, supra, 501 F. 2d at 632. There the District Court assigned a goal of 30% based apparently on the estimation that non-whites constitute approximately 25.09% to 30.06% of the total population of New York City, Nassau and Suffolk Counties. This Court, however, was quick to point out that the relevant population for minority purposes was not the gross population figure, but members of the working force who, but for the discriminatory practices, would have become steamfitters. Thus, it did not include women, it did not include children under the age of 18 years. Therefore, in assessing the relevant underlying population, males, eighteen and over in the labor force within the relevant geographic area. The Court wrote, 501 F. 2d at 633:

"However we believe that reliable statistics with respect to the labor force provide a more accurate basis for arriving at an appropriate non-white percentage goal than does the information relied upon by the district court, which included not only males forming the labor force, but females, children, retired persons, and others who would not, absent discrimination have been the source of union members or apprentices."

In the instant case, while the relevant underlying population appears facially clear, it is not. We start with the proposition that an affirmative action goal or quota is not essentially forward looking, but backward looking - to provide for those who, but for, the unlawful practices would have been in the position in dispute. As the tables on p. 131 supra show minority representation in the underlying Correction Officer title has rapidly increased since 1970, and indeed was one of the considerations in lowering the minimum experience requirements to two years' service to take, three years for appointment (T. 456, A. 692). Thus, if any goal or quota is imposed, it should reflect the fact that not all Corrections Officers were eligible for appointment or even competing at the time 34-944 was administered; that for a substantial portion of the relevant underlying minority population, 34-944 was the

first examination that could be taken; and that consequently, the degree of exclusion of minorities from the title in the past, if any, was, at best, small.\* (According to plaintiff Kirkland, in 1965 there were "ten or fifteen" and in 1968, there were approximately twenty-five). Even assuming that none of the 1968 minority candidates were repeaters, the pass rate was approximately 10% or four of forty. The same as the total pass rate on the 1970 examination (T. 234, A. 471).

The Court, therefore, in requiring parity did not draw lines with the degree of precision as required by the rulings of this Court. In Rios, supra, 510 F. 2d at 633, the Court emphasized the importance of such precision. It there stated:

"However, we believe that from the outset the court should be guided by the most precise standards and statistics available in view of the delicate constitutional balance that must be struck in the use of such goals and quotas between the elimination of discriminatory effects, which is permissible and the involvement of the court in unjustifiable 'reverse racial discrimination,' which is not."

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\*It should further be noted that prior to 34-944, there had been at least 4 non-white Correction Sergeants. In addition to Captain Harris and Lieutenant Hill, were a Ben Thompson, who apparently was fired and Clarence Cheatham, who refused the appointment (T. 237, A. 474).

See United States v. Ironworkers Local 86, 443 F. 2d 544 (9th Cir., 1971), cert. den. 404 U.S. 984 (1971).

It would appear therefore that the District Court in imposing a parity requirement, did not concern itself with either the facts of this case or the law applicable to it. It rather, despite the requirement that a court should approach the use of quotas "gingerly", took a broad-based position without any supporting data, and without any sensitivity to the limited purpose of a goal or quota. For this reason alone, the decree of the District Court should be vacated.

One further matter must be considered, the interim appointment procedure. (Order and Decree dated July 31, 1974, ¶4) (A. 243). Wholly aside from the defects inherent in the procedure already discussed in the context of the requirement of the final selection procedure, the interim procedure, insofar as it mandates permanent appointments suffers from the additional defect of superfluously. The title at issue in this case, unlike those in Vulcan, supra, or Bridgeport, supra, is not an entrance level title drawing its candidates from the population as a whole. It rather draws its candidates from a pool of trained, experienced correction officers. Consequently, the need for making permanent appointments is not as pressing as it

would be in the case of patrolmen or firemen; as necessary positions can be filled on an interim provisional basis. The obligation of the State under the Civil Service Law, and the State Constitution is to make appointments and promotions on a merit and fitness basis "to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive ...". N.Y. State Const. Art. 5, § 6. In eliminating the competitive examination requirement, the District Court has, in effect, avoided State constitutional requirements, as binding on defendants as is the Fourteenth Amendment. For this reason, insofar as it appears that the interim provisions lead to permanent, as opposed to provisional appointments, to the Correction Sergeant position, the Decree should be vacated.

E. The District Court Erred in Enjoining Defendants from Terminating or Otherwise Interfering with the Provisional Appointments of Plaintiffs and Certain other Members of The Class

Though not specifically included in the final order and decree of July 31, 1974, the District Court, in its "so ordered" opinion enjoined defendants from (A. 189):

"...terminating the provisional appointments of the named plaintiffs and those members of the class who are provisional Correction Sergeants solely because of their inability to pass 34-944."

This, in the absence of any showing that plaintiffs or members of their class currently serving provisionally in the position are as or better qualified than anyone else whether whites or other minorities.

Provisional appointments are made pursuant to Civil Serv. L. § 65 for a temporary period not to exceed nine months. They carry with them no tenure or other rights, no presumption of ability, merely a statement that the individual, but for the requirement of the eligible list, is qualified to serve in the position. Russell v. Hodges, supra. Thus, to freeze plaintiffs and members of the class in their provisional positions is to create rights where none exist. This cannot be countenanced.

That the appointments of plaintiffs and others as provisionals was not made on a competitive, merit-based system is amply shown by the record. Superintendent Shubin, the Superintendent of Ossining Correctional Facility, asked his supervisors to each submit ten names of those thought to be "sergeant material" (T. 71, 83-4, A. 318-331). The recommendations coming from Ossining were, according to Deputy Superintendent Ryder, based only on drawing from those Correction Officers at Ossining who were willing to serve temporarily as a Supervisor, not from the best of all eligible Correction Officers in the State. Therefore, the order of the District Court restraining defendants from interfering with the minority Correction Officer appointments constitutes an abuse of discretion and, at best, an invidious distinction between list provisionals (those who would be permanent Correction Sergeants but for the District Court's injunction) and non-list provisions covered by the Court's injunction merely because the non-list provisionals are Black.

Such an order cannot stand.

POINT V

THE COURT ERRED IN AWARDING  
ATTORNEYS FEES UNDER THE FACTS  
AND CIRCUMSTANCES OF THIS CASE  
AGAINST THE STATE OF NEW YORK.

A. Sovereign Immunity Bars the Award of  
Attorney's Fees

Plaintiffs asked and the District Court granted in this civil rights action, brought under 42 U.S.C. §§ 1981, 1983, that in addition to declaratory and injunctive relief they also be awarded costs and reasonable attorneys' fees.\*

This action, like Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y., 1971), aff'd 458 F. 2d 1167 (2d Cir. 1972); Bridgeport Guardians v. Bridgeport Civil Service Commission, 354 F. Supp. 778 (D. Conn., 1973), aff'd in pt. and rem. in pt. 482 F. 2d 1333 (2d Cir., 1973); and Vulcan Society v. Civil Service Commission, 360 F. Supp. 1265 (S.D.N.Y., 1973), aff'd 490 F. 2d 387 (2d Cir., 1973), is a civil rights action challenging procedures used in appointing individuals to positions in government service, as having a disparate racial/ethnic impact and not

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\* It should be noted in passing that plaintiffs are represented in this action by attorneys employed by the NAACP Legal Defense and Education Fund, Inc., a non-profit, tax-exempt organization whose funds derive from voluntary contributions and foundation grants, and that under no circumstances do plaintiffs' attorneys charge their clients fees for services rendered. Thus the instant situation is one where the choice is not between charging either plaintiff or defendants fees, but seeking compensation from the government of the State of New York for services rendered to a minuscule (.00005%) part of the population, against all the people, as against no recovery at all.

based on demonstrably job related criteria.\* Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

Plaintiffs named as defendants in this action the Commissioners of the State Civil Service Commission, the Commissioner of the State Department of Correctional Services, both individually and in their respective official capacities, as well as the Department of Correctional Services and the Civil Service Commission itself.\*\* While named as parties in their personal capacities, the natural defendants, never having been properly served, never came within the Court's jurisdiction, Kirkland v. Department of Correctional Services, 358 F. Supp. 1349, n. 1 at 1350 (S.D.N.Y., 1973).\*\*\* As a result, any award

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\* While the action was brought under 42 U.S.C. §§ 1981 and 1983 and their jurisdictional counterparts 28 U.S.C. §§ 1343(3) and (4), as the action was begun after the effective date of the 1972 amendments to the Civil Rights Act of 1964, plaintiffs, of course had the speedier and less expensive remedy of proceeding under that Act before the State Division of Human Rights and the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e(a), as amend. Pub. L. 92-261, § 2(1).

\*\* It goes of course, almost without saying that the subdivisions, not being "persons" are quite naturally not subject to judicial decree against them, including an award of costs, as the statutes 42 U.S.C. §§ 1981, 1983 are limited to actions against "persons". Tang v. Appellate Division, F. 2d (2d Cir., 1974).

\*\*\* A motion made after the initial order in this case, on April 1, 1974, for leave to join the individual defendants, was denied by the District Court on July 15, 1974. No appeal was taken from this order (A-232).

made would, of necessity, be an award against the sovereign State of New York. The Court below rejected defendants' Eleventh Amendment claim relying on Gates v. Collier, 489 F. 2d 298 (5th Cir., 1973); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., 1972), aff'd 409 U.S. 942 (1972) and La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972). The Court erred in rejecting defendants' Eleventh Amendment argument.\*

In its simplest and most basic terms, the doctrine of sovereign immunity\*\* bars the federal court or Congress, from invading the State Treasury and requiring that payments be made therefrom. Edelman v. Jordan, \_\_\_\_ U.S. \_\_\_\_, 42 U.S.L.W. 4419 (3/25/74); Sostre v. McGinnis, 442 F. 2d 178 (2d Cir., 1971), cert. den. sub. nom. Sostre v. Oswald, 404 U.S. 1049 (1972); Rothstein v. Wyman, 467 F. 2d 226 (2d Cir., 1972), cert. den. 411 U.S. 92 (1973).

The purpose and meaning of the Eleventh Amendment is most recently discussed by the Supreme Court in Edelman, supra.

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\* That counsel fees have been awarded to plaintiffs in cases involving municipalities or school districts (see § 718 of the Emergency School Appropriations Act of 1972) is no moment where states are involved as neither municipalities nor school districts are possessed of sovereignty. Lincoln County v. Luning, 133 U.S. 529.

\*\* The related concept of official immunity is to be distinguished. Compare Edelman v. Jordan, \_\_\_\_ U.S. \_\_\_\_, 42 U.S.L.W. 4419 (3/25/74) with Scheuer v. Rhodes, \_\_\_\_ U.S. \_\_\_\_, 42 U.S.L.W. 4543 (4/17/74).

There, the Court granted certiorari to resolve a conflict between this Court's holding in Rothstein, supra and a conflicting Seventh Circuit ruling in Jordan v. Weaver, 472 F. 2d 985 (1973). Edelman, supra 42 U.S.L.W. at 4421. Speaking for the Court, Mr. Justice <sup>h</sup>Rehnquist noted that the Eleventh Amendment represented an immediate (in constitutional terms, necessarily counted in years) reaction to the Court's determination in Chisom v. Georgia, 2 Dall. 419 (1793). The Court wrote of Chisom (42 U.S.L.W. at 4422):

"The decision in that case, that a State was liable to suit by a citizen of another State or of a foreign country, literally shocked the Nation.

\* \* \*

While the [Eleventh] Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State."

Proceeding Edelman by some two years, this Court wrote in Sostre v. McGinnis, supra 442 F. 2d at 205:

"This liability [imposed under 42 U.S.C. § 1983] however, is entirely personal in nature intended to be satisfied out of the individual's own pocket. Moreover,

the doctrine of sovereign immunity, as codified by the Eleventh Amendment, bars the exaction of a fine from a state treasury, at least on account of tortious actions committed by its agents under the circumstances of this case."

Similarly in Rothstein, supra 467 F. 2d at 236-7, Judge McGowan\*, writing for this Court, stated:

"It is one thing to tell the Commissioner of Social Services that he must comply with federal standards for the future if the State is to have the benefit of federal funds in the program he administers. It is quite another thing to order the Commissioner to use State funds to make reparations for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force."

The Court continued 467 F. 2d at 238:

"The doctrine of Ex Parte Young has made it possible for suits to be brought in federal courts against state welfare officials without infringement on the Eleventh Amendment, but the available remedies against them do not comprehend judgments involving the payment of money which are intended to be - and which can only be - liquidated by the expenditure of state funds." [Emphasis supplied]

It is thus clear from this discussion that the States are immune from money judgments against them, no matter whether it is termed

"equitable restitution" or incident to the injunctive relief granted under the doctrine of Ex Parte Young, *supra*, or part of the comprehensive relief the Courts of equity should fashion under the broad grant of power under 42 U.S.C. § 1983. See Rothstein v. Wyman, *supra* 467 F. 2d at 237.

Of course, it is not contended that the Eleventh Amendment bars the federal court from compelling a State official from bringing his conduct into compliance with constitutional standards. Nor is it contended that the Eleventh Amendment bars the federal court from issuing injunctive relief which by its nature, necessarily requires the expenditure of public monies. Graham v. Richardson, 403 U.S. 365 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970). What this case presents is a situation where the imposition of counsel fees, whether "reasonable" or not, is in no way "a necessary consequence of compliance in the future with a substantive federal question determination" Edelman v. Jordan, *supra*, 42 U.S.L.W. 4424. It is rather that the award of counsel fees represents nothing more than a form of compensation to plaintiffs and their attorneys akin to and part of the measure of damages.\* Jordan v. Gilligan, 500 F. 2d 701, 709-10 (6th Cir., 1974); Skehan v. Bd. of Trustees, Bloomsburg State College, 501 F. 2d 31 (3d Cir., 5/19/74).

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\* As was inferred by Chief Justice Burger in Scheuer v. Rhodes, *supra* a government should not be forced into a position where it governs at its peril. This is particularly so in the equal employment area, where by the time it appears that an examination has a disparate impact, the examination itself is months old, and the need to make appointments may be critical. The discrimination is thus not apparent until months after the act is done.

Nor is it significant that the State itself is not named as a party. It is now too well settled to be susceptible of debate that where state officials are sued in their representative (as opposed to their personal capacity) the real party in interest is the sovereign and it is entitled to use its sovereignty to protect the public fisc from invasion, though state officials are nominal defendants. Edelman v. Jordan, *supra* 42 U.S.L.W. at 4422; Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973); Kennecott Copper Corp. v. State Tax Comm'n., 327 U.S. 573 (1946); Ford Motor Corp. v. Department of Treasury, 323 U.S. 459, 464 (1945); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1945); Rothstein v. Wyman, *supra*; Westberry v. Fisher, 309 F. Supp. 12 (D. Me., 1970); Sostre v. McGinnis, *supra*.

The Court below's reliance on the language of Gates v. Collier, 489 F. 2d 298 (5th Cir. 1973) to the effect that the award of counsel fees out of the State Legislature's appropriation for the operation of the prison, is clearly misplaced, as the case was decided before the Edelman decision.\* For the same reasons, Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., 1972) and La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal., 1972)

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\* Indeed the viability of Gates is seriously cast in doubt since, in part it relies on the "equitable restitution" theory specifically rejected by the Supreme Court in Edelman, Gates v. Collier, *supra*, 489 F. 2d at 302, see particularly n. 2.

is similarly misplaced.\*

Defendants concede that, to some extent, the obiter dictum in this Court's recent decision in Jordan v. Fusari, 496 F. 2d 646, (2d Cir., 1974) undercuts its Eleventh Amendment argument. There the Court remanded to the District Court to consider the propriety of legal fees in a § 1983 action. The Court addressed the Eleventh Amendment bar in the following terms (496 F. 2d at 651):

"It is true that defendant did not agree to pay attorney's fees, and indeed has opposed them with every conceivable argument except the eleventh amendment. But in this context, we do not believe that the eleventh amendment, waived as to benefits, could bar the claim for fees alone. Moreover, it appears to us that the allowance awarded here as part of an order granting injunctive relief [restraining defendants from enforcing a provision of the unemployment compen-

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\* That Sims was ultimately affirmed by the Supreme Court, does not in light of Edelman, supra, make it controlling precedent, as Edelman overrules, and therefore vitiates Sims' value. As the Court wrote in Skehan, supra 501 F. 2d n. 7 at 42-43:

"The contention could be made that, by failing to expressly overrule its summary affirmance in Sims v. Amos, 409 U.S. 942 (1972), aff'd 336 F. Supp. 924 (M.D. Ala. 1972) (3-judge court) of an award of attorneys fees against state officers which was to be satisfied from the state treasury, the Court meant to leave the issue open. See Gates v. Collier, 489 F. 2d 299 (5th Cir. 1973), following Sims and quoting the jurisdictional statement raising the eleventh amendment issue before the Court. Such a conclusion would, however, be inconsistent with the Edelman Court's rationale. We attribute the Court's omission to inadvertance.

\* \* \*

We think Edelman must be read as closing the door on any money award from a state treasury in any category".

See also, Jordan v. Gilligan, supra 500 F. 2d at 708-9.

sation law barring pregnant women from receiving unemployment compensation] has, at most the 'ancilliary effect on the state treasury', which Edelman v. Jordan ... characterizes as 'a permissible and often inevitable consequence of the principle announced in Ex Parte Young,' 209 U.S. 123 (1908). (Footnote omitted).

It is urged that the Court should reconsider this statement, as the award of counsel fees is not within the purview of the exceptions announced in Edelman.\* The "ancilliary effect" referred to in Edelman were those that flowed from the injunction itself.\*\* Thus in Ex Parte Young the State treasury was affected because the Attorney General was enjoined from enforcing a statute, and penalties for violation of the statute would have brought substantial funds into the state treasury.

In Graham v. Richardson, 403 U.S. 365 (1971), another example of an "ancilliary effect" decree, a substantial effect on the state fisc was mandated because state welfare officials were enjoined from denying welfare benefits because of alienage. Finally in Goldberg v. Kelly, 397 U.S. 254 (1970) the funds were expended because the State could not terminate benefits without a prior adversary hearing.

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\* Indeed, the award of counsel fees is more akin to the exaction of a "fine" or payment for services rendered both barred by the eleventh amendment. See Sostre, *supra*.

\*\* The recent decision of this Court in Class v. Norton,        F. 2d        (2d Cir. Slip Op. 85, 10/10/74) (Dkt. No. 74-1702) while on its face reaffirms Jordan, *supra*, is distinguishable on the grounds, recognized by the Court, that the award of counsel fees is a necessary result of attempts to gain compliance with a decree which by its terms is prospective in nature, is truly ancilliary within the meaning of Edelman, while in the instant case it is not.

The Court in Edelman, supra describes the exception as follows (42 U.S.L.W. at 4424):

"But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct."

This is the ancillary effect on state treasuries that the Court in Edelman found consonant with Ex Parte Young.

The award of counsel fees however stands on an entirely different footing. The State, if it is found by this Court to engage in unconstitutional conduct, may have to expend money in order to bring its conduct into compliance with the Court's decree. But such expenditures are "a necessary consequence of compliance in the future with a substantive federal question determination."\* The compensation to plaintiffs for counsel fees, while ancillary to the Court's decree is, in no way, a "necessary result of compliance with decrees which by their terms are prospective in nature." It is rather, even assuming the viability of the "private attorney general" theory relied on by the plaintiff and the District Judge, a form of compensation or restitution of

\* These expenses are necessarily those incurred in connection with and validation of the new examination device.

monies paid or expenses incurred.\* As such, it is akin to the practice condemned by this Court in Sostre, supra, 442 F. 2d at 205. Ford Motor Co. v. Department of Treasury, supra. See Sincock v. Obara, 320 F. Supp. 1098 (D. Del., 1970) (3 Judge Court).\*\*

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\* As Judge J. Skelly Wright recently stated, writing for the District of Columbia Circuit en banc in Wilderness Society v. Morton, 495 F. 2d 1026, 1037 (1974):

"The first purpose of an award of fees is to make the client whole. See Clark v. American Marine Corp., E.D. La. 320 F. Supp. 709 (1970), aff'd 5th Cir., 437 F. 2d 959 (1971); United States v. Mutual Automobile Insurance Co., D. Or., 245 F. Supp. 58 (1965)."

Such a measure is the same as the measure of damages in any run of the mill tort or contract case. See Prosser, Torts, 3d Ed. § 1 at 5-6; Restatement of the Law of Contracts §§ 326 et seq.

\*\* In an analogous situation, the Court in Natural Res. Def. Council v. Environmental Prot. Agency, 484 F. 2d 1331, 1334-5 (1st Cir., 1973), found it necessary to look to a statutory waiver in order to impose costs against the United States. As both the State of New York and the United States are sovereigns who alone can waive sovereign immunity, the necessity of relying on statutes to find a waiver of immunity by the United States in 42 U.S.C. § 1857h-2 infers that sovereign immunity applies to costs and attorneys' fees. See also United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926). (In absence of a statute specifically authorizing costs and attorneys fees against the United States, sovereign immunity bars such awards). See 42 U.S.C. § 2000e-5(k). Under our federal system, a State is as much a sovereign as the United States.

B. The Court Below, Under the Facts and Circumstances of This Case, Erred in Awarding Plaintiffs' Reasonable Attorneys Fees.

The District Court, while conceding the correctness of defendant's proposition that in the ordinary course of litigation, each party is to bear their own attorneys' fees, nevertheless awarded plaintiffs reasonable attorneys fees in this case. In so doing it relied on the so-called "private attorney general" exception to the general rule. Kirkland v. New York State Dept. of Correctional Serv., 374 F. Supp. 1361, 1380 (S.D.N.Y., 1974).\* (A-190 et seq.)

The exception upon which the Court relied finds its source in Newman v. Piggie Park Enterprises Inc., 390 U.S. 400 (1968). However, there is little in Newman, to support such an award in the instant case, and per force, less that make it the virtually automatic award that the court did without an examination of the relevant factors. See Sims v. Amos, 340 F. Supp. 691, 693 (M.D.A la, 1972), affd. 409 U.S. 942 (1972). In Newman, supra, the Court granted certiorari to consider (390 U.S. at 401)

"whether this [counsel fees only to the extent that respondents' defenses had been advanced for purposes of delay and not in good faith] subjective standard properly effectuates the purposes of the counsel-fee provision of Title II of the Civil Rights Act of 1964".

\* See Fleischmann Distilling Corp. v. Maier Brewing Corp., 386 U.S. 714 (1967); Sprague v. Ticonic National Bank, 307 U.S. 161.

The Court then decided, noting that if counsel fees were only to be awarded where defendants make completely groundless contentions for purposes of delay, no new legislation would be needed, proceeded to award counsel fees on the basis that the petitioner obtains an injunction under that Title, not only for himself, "but also as a private attorney general...." thus vindicating a policy considered to be of the highest import. The court took particular note of the fact that under Title II, as plaintiffs cannot recover damages, few litigants would bring such actions if they were "routinely forced to bear their own attorneys' fees". 390 U.S. at 401.

It thus appears from a reading of Newman, supra that before the Court awards attorneys fees on the "private attorney general" theory, it must be an action where Congress has specifically authorized an award of attorneys fees, the benefit to the individual plaintiff must, of necessity, be small compared to the benefit accruing to a large and unidentifiable class,\* the action must vindicate a strong public policy, and it must appear that plaintiffs would not bring such actions if they were routinely forced to bear their own attorneys fees. La Raza Unida v. Volpe, 57 F.R.D. 94, 99 (N.D. Cal. 1972). Indeed, La Raza at least in this aspect, appears to focus on three aspects of an environmental lawsuit [id]:

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\* In contrast, where the class benefitted is discrete and identifiable, the costs of vindicating the right must be apportioned among members of the class, so as to vitiate against free riders. Mills v. Electric Auto-Lite, Inc., 396 U.S. 375, 393-4 (1971); Hall v. Cole, 412 U.S. 1, 5 (1973).

"The matter is addressed to the sound discretion of the trial court and turns on such factors as the strength of Congressional policy, the number of people benefited by the litigants' efforts, and the necessity and financial burden of private enforcement".

The Court below, dealt only peripherally with these issues, making only a finding as to the effectuation of a strong Congressional policy.\* The Court, did not make findings as to the remaining factors. See e.g. Jordan v. Fusari, supra.

In analyzing these factors, it is helpful to compare the facts in the instant action with those of La Paza, supra and Lee, supra, upon which the District Court so heavily relies, and with Bridgewater Guardians v. Bridgewater Civil Service Comm'n, 497 F. 2d 1113 (2d Cir. 1974).

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\* The Court while declining to require plaintiffs to present the facts in a complex and technical area (A- ) to the agencies specifically authorized by Congress to deal with such issues, nevertheless found that the provision in 42 U.S.C. §2000e-5k awarding counsel fees was a persuasive and (so it appears) controlling basis for awarding counsel fees in the instant case. It would appear therefore that plaintiffs are able to take the benefit of specific enactments without even beginning to sustain the burdens, even though the administrative process, far from burdensome, is more likely to obtain results without the expense of a full-blown lawsuit. See 42 U.S.C. §2000e-5(f); McKinney's Executive L. §29. As both these avenues were available at the time the instant lawsuit, the rationales behind Lee v. Southern Home Sites, 444 F. 2d 143 (5th Cir. 1971); Harper v. Mayor and City Counsel, 359 F. Supp. 1187 (D. Md., 1973), inapplicable. See Bridgewater Guardians, supra.

La Raza was an action brought against the California Highway Department to enjoin the construction of a highway because of the government's failure to comply with certain housing relocation and environmental provisions.\* The Court there awarded counsel fees because of the strong Congressional policy vindicated by plaintiff, 57 F.R.D. at 99; the fact that vast numbers of people were directly benefitted by the action;\*\* and the fact that only private plaintiffs could bring this action as "[t] he only public entities that might have brought suit in this case were named as defendants in this action and vigorously opposed plaintiffs contentions". 57 F.R.D. at 101. In addition, the benefit to plaintiff was minimal as compared to that of the population as a whole.\*\*\*

In Lee v. Southern Home Sites, supra, the Court, condemned a private real estate developer's practice of intentionally limiting lot sales to "whites only", analogizing to the subsequently enacted provisions of the Fair Housing Law, 42 U.S.C. § 3612(c), and finding that actions under 42 U.S.C. § 1982 are

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\* For a fuller discussion of the issues extant in the construction of federally assisted highways, and the labyrinth of legislative requirements, the Court is respectfully referred to the decision on the substantive motion in La Raza, 337 F. Supp. 221 (N.D. Cal. 1971). See also City of Rye v. Schuler, 355 F. Supp. 17 (S.D.N.Y., 1973).

\*\* The Court pointed out that in addition to plaintiff, over 500 people whose homes would have otherwise been uprooted, were directly benefitted; the 200,000 citizens of the cities involved were similarly benefitted by the preservation of the last remaining parks and the citizens of California were benefitted through "State theapeutics", preservation of the environment, even distribution of recreational facilities, and no glutting of the housing market. La Raza, supra, 57 F.R.D. at 100.

\*\*\* Citing Mills v. Electric Auto-Lite, 396 U.S. 375 (1970).

enforceable only by private parties acting on their own initiative,\* with little gain to themselves vis a vis the public at large. The Court found that the requirements underlying the award of attorney's fees were met on those facts.

In Bridgeport Guardians v. Bridgeport Civil Service Comm'n., (Guardians II) supra, the facts and circumstances were remarkably similar to those in the instant case. In the main case on the merits 482 F. 2d 1333 (2d Cir., 1973), the Court found that civil service examinations for the positions of patrolmen in the Bridgeport Police Department had racial/ethnic disparate impact and was not shown to be "demonstrably job-related" and "not prepared in any significant fashion to determine whether or not the applicant will be a good policeman". 482 F. 2d at 1338.

As a result of the findings, the Court entered an order enjoining the use of examinations of the type found discriminatory and that

"....the patrolman's examination as used by the defendants now has and for many years has had the effect of denying plaintiffs their constitutional right to equal protection of the laws".

-482 F. 2d at 1339.  
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\* The viability of Lee as a holding is somewhat cast in doubt, as a narrower ground of obdurate behavior was recognized by the Court as a basis for finding defendant liable for attorneys fees. 444 F. 2d at 144. There is no basis in the instant case however for a finding of obdurate behavior. Defendants had not previously litigated their procedures which were akin to those Judge Mansfield approved in Chance v. Board of Examiner, supra, rather than those condemned. 330 F. Supp. at

Upon remand to reconsider certain aspects of relief, the District Court was also asked to award attorneys fees, presumably on the "private attorney general" theory. The Court declined so to do. Upon appeal to this Court after remand, the Court found that the District Court, fully aware of the circumstances surrounding the case and cognizant of the significance of the fact that the action was brought not under Title VII of the 1964 Civil Rights Act, but under the provisions of the Ku Klux Klan Act, did not err in declining to award attorneys fees. See also Boston Chapter, NAACP, Inc. v. Beecher, 371 F. Supp. 507, 523 (D. Mass., 1974) [hereinafter NAACP, Inc.]

Both Guardians and NAACP, Inc., supra as does this case, involve actions under the Ku Klux Klan Act 42 U.S.C. §§1981, 1983\* challenging civil service testing techniques as not being sufficiently job-related and having a disparate racial/ethnic impact. While Guardian II and NAACP, Inc. challenge appointment procedures used in entrance level or open competitive titles, the instant case challenges only the procedures used in the promotional titles.\*\* While no "class" was declared in either Bridgeport or NAACP, Inc., as the Court found it unnecessary to do so, the instant case involves a class of all Blacks and Hispanics correction officers who took

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\* Additionally NAACP, Inc., supra involves an action brought by the United States under Title VII to enforce its provisions and for failing to remedy past discriminatory practices.

\*\* The claims regarding the underlying correction officer title were withdrawn by plaintiffs after trial.

examination 34944 and either failed or passed but ranked so low as to not have a realistic opportunity of appointment.\* Lastly, in Bridgewater unlike the instant action, the discrimination took place and the action was commenced after Chance v. Board of Examiners, supra, but before the passage of the 1972 Amendments to the 1964 Civil Rights Act. Conversely NAACP, Inc. was, as the instant case, commenced after the passage of the 1972 Amendments, but unlike the instant case, some of the plaintiffs brought the proceeding first to the EEOC. However, those plaintiffs who sued under 42 U.S.C. §51981, 1983, were denied counsel fees.

In analyzing the factors announced by the Courts in Newman, supra La Paza, supra and Lee, supra,\*\* we must first focus on the issue of the importance of the public policy vindicated in employment discrimination cases. It would appear that this consideration should not be considered in a monolithic fashion, that by merely attaching the talisman of discrimination to a lawsuit, plaintiffs have thereby established that the policy they are vindicating is of the highest public import.

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\* But see in this regard, Point III, supra. As there stated appellants do not challenge the fact that the court declared the action to be a class action, but do contest the over-inclusiveness of the class. See Miliken v. School Board, - U.S. - 42 U.S.L.W. (7/24/74)

\*\* In Northcross v. Bd. of Ed., 412 U.S. 427 (1973) and in Bradley v. School Board - U.S. -, 42 U.S.L.W. 4703 (5/15/74) the Court awarded attorneys fees in school desegregation cases, but in each case they relied, as did the Court in Newman, supra, on specific Congressional Legislation authorizing the award of attorneys fees in 1983 cases involving school desegregation suits. Section 718, Emergency School Aid Act of 1972. The Court, however, expressly declined to decide whether attorneys fees would be allowed in 1983 cases where there is no statutory authorization for such an award Northcross, supra n. 2 at 429. Nevertheless, it is particularly significant that in no case decided by the Supreme Court, have attorney's fees been awarded in a 1983 action under the private attorney general theory. Hall v. Cole, supra 412 U.S. n. 7 at 5-6. See Guardian II, supra 497 F. 2d n. 2 at 1115.

One of the factors that should be considered in determining whether plaintiffs are vindicating a public policy of the highest import is the question of whether the conflict is one of philosophy or merely a matter of execution.\* The use of merit system employment without consideration of irrelevant factors such as race or political persuasion has a long and illustrious history in New York State, particularly in the State Correctional system.

Now found in Article V, § 6 of the State Constitution, the provision

"Appointments and promotions in the Civil service of the State, and of all the civil devisions thereof including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which so far as practicable, shall be competitive..."\*\*

was first placed in the Constitution of 1894 as Article V, § 9.

However, by that time, the merit and fitness standard had existed in the New York corrections system for nearly a half century. In a study of New York's constitutional history one commentator wrote,

3 Lincoln, Constitutional History of New York, (1906) at 321:

"Thus, Governor Seymour, in 1854, forty years before the constitutional amendment considering the administration of state prisons, said that 'the management of these institutions demands mental and moral qualities of the highest order, and these are inadequate without the advantages of long experience in the performance of the peculiar nature of the service required.'"

\* \* \*

\* In this regard compare Lee v. Home Sites, supra (intentional discrimination in the sale of land); Newman v. Piggy Park Enterprises, supra (deliberate denial of equal access to public facilities on the ground it violates "God's Law"). In each of these cases, there was an intentional wilful and knowing discrimination against minorities. In the instant case however, not only had a conscientious effort been made to create a fair, content related examination specifically geared to the job and accompanied by post-examination control procedures to detect technical inadequacies; but the examination procedure itself was fair both on its face and in its administration. Compare Compl. ¶ 20, (A.20) with plaintiffs pre-trial specifications (A.99 - A.111); (T.274) (A.511).  
\*\* This test is taken from Art. V, § 9 of the 1894 Constitution.

He states principles of administration relating to penal and charitable institutions have since been applied to all departments of the public service. The assembly committee, in its report of 1852, had recommended the division of the state into three prison districts, and the appointment of three governors of each prison, who should hold office for a long term. It was thought that by this reform frequent 'changes of officers, which have been a very serious evil, would be avoided, and the prisons would cease to be party machines for the reward or punishment of active political partisans'. The committee stated the substance of the civil service idea in the remark that 'in the selection of the chief and subordinate officers it should be a cardinal point that they are fitted both by nature and education,\* for the important stations they are to fill'. The board of governors could have established and required examinations of candidates and could have secured the appointment of persons best qualified for the respective positions."

In Ch. 389 L. 1889, the Legislature required that the rule for appointment in the state correctional system was "honesty, capacity and adaptation".\*\*

Moreover, state law prohibiting discrimination in public employment and indeed in all employment within the State

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\* It is submitted that the term "education" is used here not in the narrow sense of formal schooling, but in a broader sense including, in addition, appropriate training and experience.

\*\* While it is conceded that the primary evil intended cured ~~to be~~ by civil service was not racial or ethnic classification, but political patronage, classifications based on racial and/or ethnic characteristics would have no place in a merit system appointment. Indeed the EEOC Guidelines PX-27 (A ), state:

"It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and indeed aid in the utilization and conservation of human resources generally". 29 CFR §1607.1(a). [Emphasis added] See also 42 U.S.C. §2000e-2(h).

preceded the enactment of Title VII by nineteen years and the 1972 amendments to the 1964 Civil Rights Act by twenty-seven years.

In 1945 the State of New York established the State Division of Human Rights and declared that:

"The opportunity to obtain employment without discrimination because of race, creed, color or national origin is hereby recognized as and declared to be a civil right".

-L. 1945, Ch. 118, §125\*

Thus being the case, the State in §131 of the Statute\*\* declared it an unlawful practice:

"1. For an employer, because of the race, creed, color or national origin,

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\* Now N.Y. Exec. L. §291, with amendments.

\*\* Now N.Y. Exec. L. §296 (a), with amendments.

of any individual to refuse to hire or employ or to bar or to discharge from employment such individual in compensation or in time, conditions, or privileges of employment".

The State Division of Human Rights was established to investigate and adjudicate violations and was vested with the power\* to issue cease and desist orders and to seek enforcement of these orders in the State Courts, without expense to the complainant.\*\*

It is clear from the foregoing discussion that the dual principles of merit system employment and no discrimination in employment have a long history in New York, thus indicating the State's sensitivity to the issues and its commitment to them, and leading to the conclusion that this case turns not only a philosophic base but on considerations of technical execution.

Moreover the so-called "corporate [or State] therapeutics" argument of Wills v. Electric Auto-Lite, supra which serves as a partial base behind the "private attorney-general" theory must fail, for the state has long before the federal government, deemed equal employment opportunity and merit system civil service, a matter of state interest and policy.

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\* Interestingly Congress has not seen fit to grant this same power to the EEOC. 42 U.S.C. §2000e-5(b), (f) (1).

\*\* Executive L. §297 (b) provides that where there is probable cause to believe that discrimination has or is occurring and conciliation procedures have failed [297 (a)] then the Commission shall hold a hearing with the case in support of the complaint being presented by one of the commission's agents or attorneys.

Thus, this case reduces itself in this context not to the vindication of an important public policy announced by Congress, that the State has consistently refused to recognize, but a close case involving a limited population in an isolated instance.\*

Even more importantly the results of the law suit, did not benefit the public generally, rather its effect was deleterious to the public interest.\*\* The total effect of the decree in this case was to hold the named plaintiffs and five other members of their class in their positions and to force the Department of corrections to temporize in appointing first line supervisors for a period of at least two years (A.241 et seq.)

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\* Plaintiff's will undoubtedly argue that to the contrary, the case represents a "pattern of practice" of discrimination, and that prior thereto defendants recognized the defect in their procedures, by embarking on a methods study (PX 43). Such argument however, as more thoroughly described in Point II, supra fails in light of the language in Vulcan Society v. Civil Service Comm'n, supra. 490 F. 2d at 394:

"The Fourteenth Amendment no more erected a particular theory of psychological testing than did Mr. Herbert Spencer's Social Statics. Experience teaches that the preferred method of today may be the rejected one of tomorrow." See also 490 F. N. 10 at 395. As Mr. Taylor pointed out the process of validation is not a series of discrete operations, resulting in the placing of an imprimatur of either content, construct or criterion validation, but rather a continuum where ideally for psychometric purposes, it is hoped that an examination even though content validated could also, given time, identification of criteria and proper evaluation, be criterion-validated. (T.386-7; A.622-A.623)

\*\* The normal examination cycle for Sergeants in the Correction System is two years. When the feasibility study was commenced shortly after the 1972 Examination, the expected target date for completion was 1974. Because the Civil Service Department personnel responsible for the feasibility study were of necessity diverted to preparation of the defense in this case, the new study has been delayed . . . . over a year.

Thus on balance it cannot be said that the vindication of the Congressional enactment was either the motivation of plaintiffs (T. 153, 237-8; A-390, A.474 - A.475) nor was accomplished by the limited objectives and effect of this lawsuit.

In La Raza, supra, the Court pointed out that not only had named plaintiffs benefitted, but also that all Californians had been directly and materially benefited. Similarly, in Lee, supra, a direct benefit was obtained by all non-whites potentially nation-wide who wished to purchase land. Even in Bridgenort, supra and NAACP, Inc., supra, the benefit derived was to all blacks and hispanics in the community as the job there involved was in an entrance-level title, open to the public. Here, on the other hand, the only benefit derived was to the 116 Black and Hispanic candidates who took and failed Examination No. 34-944, and

even this benefit is simply another opportunity to take an examination. Thus the public benefit criterion necessary to the award of counsel fees under the private attorney-general theory has not been met under the facts and circumstances of this case.

In Newman v. Piggie Park Enterprises, supra the benefit was literally nationwide;\* in Bradley v. School Board, supra, as in La Raza Unida v. Volpe, supra, the benefit accrued to the entire relevant population. Even in Fusari v. Jordan, supra, where the Court remanded to consider the award of counsel fees on the basis of the private attorney-general theory the class generally benefitted was significantly broader than in the instant case. Finally in Bridgeport Guardians and in NAACP, Inc., due to the open competitive nature of the examinations there is question, the benefit accrued to a much broader population than the instant case.\*\* Conse <sup>u</sup>tly, the plaintiffs cannot be said by the Court to have taken it upon themselves to confer a benefit on a broad-based and generally unidentifiable class.

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\* As is typical in all public accommodation cases, the Supreme Court has specifically stated that a person who sues under that title sues as a private attorney-general, largely because the benefit to him is minimal as compared with the population at large.

\*\* While plaintiffs originally challenged the underlying correction officer examination as well as the instant one, the claim as to the underlying title was dropped. The plaintiffs also sought to represent a class of those employees who were deterred from taking examination 34-944 but the District Court denied so much of that allegation as there was no evidence adduced as to those who might have been deterred. 374 F. Supp. n. 14 at 1379 (A.199).

Plaintiffs have also failed, obviously, to meet the second criterion -- necessity for private enforcement. As previously noted, New York State, almost three decades ago, enacted its own equal employment opportunity statute.\*

Unlike the federal counterpart, which absent effective conciliation procedures, mandates that the complainant commence any court action, or in rare cases the United States Attorney, New York provides that the State agency itself adjudicates on the issue of discrimination, performing all functions except the simple act of filing the complaint.\*\*

In La Raza, supra the Court took particular pains to show that private enforcement was indeed in that case, a necessity. It stated (57 F.R.D. at 101):

"The only public entities that might have brought suit in this case were named as defendants in this action and vigorously opposed plaintiffs' contentions. Only a private party could have been expected to bring this litigation, and yet a private party is least able to bear the tremendous economic burdens".

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\* pp. 157-8 supra.

\*\* Defendants of course recognize that under the doctrine of McNeese v. Board of Education, 373 U.S. 688 (1967); Damico v. California, 359 U.S. 416 (1967); and Gibson v. Berryhill, 411 U.S. 564 (1973), overruling sub silentio this Court's holding in Eisen v. Eastman, 421 F. 2d 560 (2d Cir., 1969), plaintiffs need not, as a condition precedent to commencing an action under 42 U.S.C. §§ 1981, 1983, exhaust state administrative remedies. However, the availability of administrative proceedings before an agency having special expertise in an area, and the deliberate failure of plaintiffs to avail themselves of that procedure, does distract from the argument that private enforcement is necessary. See La Raza Unida v. Volpe, supra.

cp

Indeed, it was to specifically avoid the tremendous economic burdens imposed by bringing cases such as the instant one under 42 U.S.C. § 1981, 1983 that Congress expanded the coverage of Title VII to public employment.\* H. Rep. No. 92-238, 2 U.S.C.C.A.N. 2137, 2153:

"While an individual has a right of action in the appropriate court against employment discrimination by state and local governments if he has been discriminated against, the adequacy of protection against employment discrimination by state and local governments has been severely impeded by the failure of Congress to provide Federal administrative machinery".\*\*

Where, however, plaintiffs have failed to use the less expensive forum, virtually requiring that attorneys be retained

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\* While a colorable argument might be posed where the action was commenced prior to the 1972 amendments when recourse to the EEOC was not available, such an argument is without force in the instant case as it was commenced subsequent to the enactment of the 1972 amendments. Not in any case would it be applicable in New York as the State Human Rights Division has been enforcing the equal employment opportunity principle since 1945. See pp. 157-159 *supra*, see also 42 U.S.C. § 2000e-5(c).

\*\* The relevance of the availability of the State agency cannot be overstated. Not only are the Human Rights Commission's powers greater than that of the EEOC (and even the District Court with regard to public employers, See Executive Law § 297[c] regarding the payment of compensatory damages) regarding enforcement (See discussion pp. 157-159, *supra*), but it precedes the EEOC by almost twenty years. Congress itself recognized the viability of this principle when it stated: "...[T]he Committee recognizes that States frequently can best deal with violations which occur within their boundaries and has, accordingly, retained the provisions... of the Present Act... whereby the Commissioner will defer to appropriate State agencies where the state or local agency can grant the complainant relief similar to that which he can obtain with the Commissioner under the provisions of this bill". 2 1972 U.S.C.C.A.N. at 2154.

equity mandates not that defendants compensate them for choosing that forum, but that plaintiffs bear the cost of their own choice.

Finally, while the District Court eschews the distinction between the civil rights action brought under §§ 1981 and 1982 and that under Title VI, this Court has noted that such a distinction is both appropriate and necessary. Bridgeport II, supra, F. 2d at 1115; Stolberg v. Trustees, 474 F. 2d 485 (2d Cir. 1973). It is also appropriate to note that in no case of this type before this Court has there been an award of counsel fees

In conclusion therefore, the District Court erred in mechanically applying the rule in Newman v. Piggy Park Enterprises, supra for that rule is clearly available only where the statute under which a plaintiff sues particularly provides for the award of counsel fees. Where there is no such statute, plaintiff must demonstrate that he falls within one of the exceptions. The record does not support any such determination.

Moreover, even if plaintiff does so demonstrate, the court failed to take account of where the funds available for expenditure on counsel fees would do the most good. While equity has the right to fashion a complete remedy, it is axiomatic that the remedy must balance the competing interests of both sides.

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CP

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Thus is the public interest better served by furnishing a substantial sum of money to a non-profit tax-exempt corporation whose sole function is to litigate cases involving even questionable practices, and for which it solicites funds upon which it does not pay any taxes,\* or to the government itself to allow for the improvement of testing procedures? Clearly a statement of this issue is sufficient to suggest its resolution - the funds should be retained by the State.

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\* To this extent (approximately 50% of its income) it is in fact government supported, and therefore like OEO Legal Service organizations, a "public" attorney general.

CONCLUSION

FOR EACH OF THE ABOVE-STATED REASONS,  
THE DECISIONS OF THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN DIS-  
TRICT OF NEW YORK SHOULD BE REVERSED,  
AND THE ORDERS AND DECREES APPEALED  
FROM, INCLUDING THE TEMPORARY RE-  
STRAINING ORDER, SHOULD BE VACATED.

Dated: New York, New York  
March , 1975

Respectfully submitted,

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paration of this brief.

This copy is substituted for copy originally  
filed. It corrects typographical errors appearing  
in the original. Please use this copy.

APPENDIX "A"

498-5896

September 11, 1973

Re: Kirkland et al. v.  
N.Y.S. Dept. of Correctional Services, et al.

Hon. Morris Lasker  
United States District Judge  
United States Courthouse  
Foley Square  
New York, New York 10007

Dear Judge Lasker:

I respond to a letter dated August 20, 1973, from Ms. Deborah Greenberg, an attorney for the plaintiffs, objecting to documents marked Exhibits "CG" through "LL", offered in evidence by the defendants.

Shortly after Mr. Siegal commenced his testimony, the court inquired whether or not a statement of his qualifications would be submitted. I answered that it would be and Exhibit "CG" constitutes the response.

At conference with the court and the attorneys on July 30, 1973, the need for supplemental proceedings was discussed briefly. In this context, I advised the court that defendants wished to establish for the record, both the qualification of the two other line officers who worked with Captain Spurbeck and Mr. Siegal's group in developing the Law, Methods and Practices and Judgment subtests on examination No. 34-944 and the qualifications of the several employees in the cross-occupational skills group of the Department of Civil Service who had prepared the Report Preparation and Supervision subtests. I noted in addition that defendants had not presented any testimony on the pending class action motion. Mr. Baller, an attorney for the plaintiff, noted that he had not yet presented any testimony on the value of the attorneys' services performed in support of his claim for fees.

In an effort to avoid taking further courtroom time, I suggested that the qualifications of the individuals which

Hon. Morris Lasker  
Re: Tirkland et al. v.  
N.Y.S. Dept. of Correctional  
Services, et al.

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undertaken in ordinary course and without reference to the pendency of this litigation. Prior dutes statements are available should the Court or the plaintiffs' attorney wish to examine them.

The last paragraph of page 2 of Exhibit "LL" (resume of John S. Becker) contains several references to the duties of other individuals in the cross-occupational skills unit of the Department of Civil Service. Although my own review lead me to conclude that Mr. Becker's remarks were simply gratuitous, defendants' attorneys have no objection to the Court striking this paragraph if plaintiffs believe it prejudicial to their interests. In this context, it should be noted that the individuals concerned were merely asked to submit resumes. It appears that Captains Cuirci and Harris already had documents of this type prepared for their personal use and submitted those whereas the employees of the Department of Civil Service prepared their resumes after receiving my request therefor.

Ms. Greenberg also states that since defendants "refused to provide" the names and qualifications of the individuals "who were responsible for developing the Correction Sergrants' examinations," they should now be precluded from offering Exhibits "GG" through "LL".

Ms. Greengerg's recollection of the events is misstated. As reference to plaintiffs' Exhibit "1" (Plaintiffs' First Interrogatories to Defendants) and Exhibit "2" (Answers to Plaintiffs' First Interrogatories "1-2", "4-11", "13-18", "22-40" and "43-48") show defendants objection was to providing the names and qualifications of each employee responsible for developing Correction Sergeant and Correction Officer examinations from 1961 down to the date of the interrogatories. (See e.g. interrogatories "12" and "29" and answers to interrogatory "29"). There was discussion of this point at the first conference with the Court on or about May 30, 1973. At that time I indicated that

Hon. Morris Lasker  
Re: Kirkland et al. v.  
N.Y.S. Dept. of Correctional  
Services, et al.

September 11, 1973  
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the defendants objection was to providing the massive amount of material that was requested in the interrogatories and not to providing descriptive material about the individuals involved in examination No. 34-944. Indeed, I offered at the conference to provide the plaintiffs' attorneys with background material about those individuals upon their request therefor. However, no such request was ever made.

As noted, Exhibits "GG" through "LL" are intended to supplement the existing record just as plaintiffs intended to offer affidavits for the record on their own behalf. Mr. Kantor advises me he expressed this purpose to Mr. Baller during their telephone conversation. Obviously, both sides can present their proof through live testimony, and defendants will undertake to do so if that course is found to be necessary. However, in view of our discussions on July 30th, it appeared to me that both sides agreed to make every effort to avoid this course of action particularly with respect to matters as straightforward as the individuals' resumes here in issue. With respect to the additions to the record in the class action motion, defendants have determined that such additions will not be necessary.

Certainly, if plaintiffs' attorneys have a different form of resume in mind which they would prefer or if their objections would be resolved by their directing written questions in the nature of cross examination to the individuals whose resumes have been submitted, defendants will undertake to provide appropriate responses.

I regret the delay in answering the August 20th letter which was occasioned by the vacations of Mr. Kantor and myself.

Very truly yours,

LOUIS J. LEFKOWITZ  
Attorney General  
By

JG:mm

JUDITH CORDON  
Assistant Attorney General

cc: Deborah Greenberg, Esq.  
Morris Baller, Esq.  
1 Columbus Circle  
New York, New York 10019

Kenneth Z. Siegal  
1066 Curry Road Apt. 35  
Schenectady, NY 12306

Associate Personnel Examiner

Education

1964-1968 Rensselaer Polytechnic Institute, Troy New York  
B.S. - Biology including 30 credits in psychology and mathematics.

1971 to date State University of New York at Albany  
Currently enrolled in M.S. program in Educational Psychology and Statistics  
18 credits including 9 in statistics and experimental design and 9 in tests and measurement; learning; development

1968 to date in-service training courses at New York State Department of Civil Service  
Statistics for Researchers  
Basic Statistics Course  
Item writing  
Personnel Examiners course in test development and evaluation.

Experience

July 1968 - May 1969 Personnel Examiner - Public Safety Unit (Examinations- Dept. of Civil Service)  
Preparation and analysis of examinations for both State agencies and local jurisdictions including police; environmental health; weights and measures.

May 1969 - May 1971 Personnel Specialist - U. S. Army - U.S. Army Reception Center at Ft. Jackson, S. C.  
Administered and scored the Army General Classification Battery  
Interviewed over 5000 new inductees regarding their personal history, education, work experience, etc.  
Recommended inductees for training and work assignments based on test scores and prior experience and training.  
Prepared orientation for receptees describing the Army classification/recommendation procedures as well as all of the jobs currently available for new incoming personnel.

June 1971 - July 1972 Senior Personnel Examiner - Public Safety Unit (Exams. - Dept. of Civil Service)  
Similar functions/examinations as those for 1968-69 period, with the addition of State and local Correction examinations.  
Preliminary stages of Correction project.

*DY 66 Lider*

Kenneth Siegal

Associate Personnel Examiner

August 1972-to date Associate Personnel Examiner - Selection Process Evaluation Section (Dept. of Civil Service)

Team leader for IPA Correction Study. (A methods research project involving the production of criterion-related exams.)

Staff consultant to other examiners with regard to validation efforts in correction related fields.

Professional Organizations

Public Personnel Association.

PERSONAL DATA

WILLIAM CIURO

July, 1973

PERSONAL DATA:

Birthplace: Elmira, New York  
Birth Date: October 27, 1934  
Marital Status: Married--February 14, 1953  
Name of Spouse: Martha R. (Maines) Ciuros  
Children: 4 Girls--ages 11, 17, 19, 20  
and 1 Boy--age 13

Address: #9 Winchester House  
Oxford Heights  
Albany, New York 12203

EDUCATION:

Attended Elementary, Junior High and High School in  
ELMIRA, New York

Obtained New York State High School Equivalency Diploma

Attended several labor relations classes and seminars in  
AFSCME, AFL-CIO

MILITARY SERVICE:

New York State National Guard, 1951-1956

Honorably Discharged as Sergeant 1st Class

EMPLOYMENT HISTORY & EXPERIENCE:

MOORE BUSINESS FORMS, Elmira, New York - 1951-1955  
(Laborer and Machine Operator)  
GENERAL ELECTRIC CO., Elmira, New York - 1955-1956  
(Crane Operator)

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES:

GREEN HAVEN PRISON, Correction Officer -- 1956-1959  
ELMIRA REFORMATORY, Correction Officer -- 1959-1968  
WOODBOURNE REHABILITATION CENTER, Correction Sergeant -- 1968  
ELMIRA RECEPTION CENTER, Correction Sergeant -- 1968-1970  
ELMIRA CORRECTIONAL FACILITY, Correction Sergeant -- 1970-1971  
CENTRAL OFFICE BUREAU OF STAFF DEVELOPMENT, Correction  
Lieutenant and Training Officer -- 1971-1972  
CENTRAL OFFICE, Facility Operations Specialist  
(Assistant to Deputy Commissioner) 1972-

OTHER EXPERIENCE & TRAINING:

Attended Moran Institute, 1968  
ACA, Cornell Industrial & Labor Relations School  
Testified before Select U.S. Congressional Committee on Crime

ORGANIZATION AFFILIATIONS:

American Correction Association (Life Member)  
Middle Atlantic States Conference of Correction (Member)  
Massachusetts Correctional Association (Member)  
Industrial Relations Research Association (Member, Advisory  
Committee)

TEACHING-TRAINING BACKGROUND:

Development of and teaching at Labor Relations Seminars  
sponsored by Council 82, AFSCME, AFL-CIO.  
Lectured at Russell Sage College, Labor Relations  
Lectured at Cornell University, Industrial and Labor Relations  
School  
Developed the curriculum for and directed the first three-  
month training program for new Correction Officers  
in New York State

INTERESTS:

Criminal Justice System  
Correctional Administration  
Labor Relations  
Employee Training and Career Development  
Mediation

SPORTS, HOBBIES & OTHER INTERESTS:

Taught Boxing and Physical Fitness at Elmira Correctional Facility  
Boxing, football, baseball and enjoy playing chess

EMPLOYEE & LABOR RELATIONS:

SHOP STEWARD, U.E. at General Electric Co,  
Elmira, New York -- 1955-1956

PRESIDENT, Correction Officers Local 1240,  
Council-50, AFSCME, AFL-CIO -- 1960-1968

MEMBER, Correction Policy Committee, Council-50  
AFSCME, AFL-CIO -- 1960-1968

CHAIRMAN, Pension Committee, Council-50  
AFSCME, AFL-CIO -- 1964

LEGISLATIVE REPRESENTATIVE, attended and actively  
participated in all International AFSCME, AFL-CIO  
Conventions during this period as well as Council-50  
and NYS AFL-CIO Conventions. -- 1962-1967

INTERNATIONAL REPRESENTATIVE for AFSCME in New York State -- 1967

PRESIDENT and CHIEF EXECUTIVE OFFICER, Council-82, AFSCME,  
AFL-CIO, (Statewide Organization representing  
approximately 7,500 New York State Employees). Having  
Administrative responsibility for operational Budget  
in excess of 1/2 million dollars. -- 1969-1971

Have negotiated major NYS Labor Agreements and was  
responsible for implementation of same.

Extensive experience in employee grievance handling,  
disciplinary hearings, and various levels of Labor Management  
Meetings as well as mediation.

Development of career development programs involving  
both pre-job and on-the-job training programs.

Have had responsibility for maintaining a close and  
constant working relationship with various State Agencies.

My responsibility as a Facility Operations Specialist requires that I spend approximately 50% in the field at correctional facilities. I am deeply involved in the establishment of critical posts at these facilities and the planning of programs and viable alternatives to existing programs. I am also responsible for the development of policies and procedures relating to the attached duty statement and in the course of my field visits, I make continuous tours and observations of the physical plants and the men that staff them. In addition, I continuously talk with inmates, officers, union groups and the like, about the operational aspects and procedures of the institution and determine inmates' satisfaction while participating in facility programs.

Serving as a general staff assistant having responsibilities for all major phases regarding correctional facilities the FACILITIES OPERATIONS SPECIALIST shall:

- a. Formulate and implement safety, security and health measures and safety and security methods of carrying out institutional programs.
- b. Formulate and periodically update plans and procedures for controlling riots, fires, escapes and other disasters and emergencies.
- c. Review and approve all cell equipment used by inmates.
- d. Establish, maintain and review compliance with procedures for inmate discipline, transfer and transportation of inmates, correspondence and visiting procedures, censorship of mail, inmate liaison programs and the inmate assignment procedures.
- e. Establish and continually update critical manpower post assignments.
- f. Develop and be responsible for administering all phases of the department's programs of custody, care and facilities operations.
- g. Review and revise plans for physical construction in regard to safety and security or proper care of inmates and develop recommendations for same.

- h. Continually assess all phases of custodial staffing consistent with changes in the field of correctional services..
- i. Define, review and maintain guard post and patrol plans in the facilities.
- j. Develop rules for inmates and employees, implement same and conduct constant review and develop necessary changes as the need dictates.
- k. Assist the Bureau of Staff Development in designing necessary training programs for correctional personnel and assuring implementation on on going in-service training programs.
- l. Maintain necessary communications and relationships between facilities and within each facility to create and maintain a harmonious atmosphere in the area of employee relations.
- m. Perform technical work at all high levels (facilities and department) of a broad scope relative to all correctional institutions and to promote the operational efficiency and progressive development in the department.

July 13, 1973

## R E S U M E

DAVID R. HARRIS  
17 Marian Lane  
Loudonville, New York 12211  
Telephone: 462-0458

### Education

- Graduated from Oneonta High School, Oneonta, New York in 1949
- Attended SUNY, Oneonta, New York, 1949-1950 (Education Major)
- Attended Union College, Schenectady, New York, on part-time basis from 1968-1969
- Presently matriculating at Empire State College, Albany, New York, working for Bachelors Degree in Criminal Justice

### Other Training and Education

- Completed a thirty three (33) hour course--Introductory Course for Correctional Employees (1960)
- Completed a thirty (30) hour course in Techniques of Group Counseling (1964) SUNY, Albany
- Completed five (5) twenty (20) hour courses at the Institute on Crime and Delinquency, St. Lawrence University, Canton, New York (1965-1970)
- Completed a one-week program for Prison Administrators at The Center for the Study of Crime and Delinquency, Southern Illinois University, Carbondale, Illinois (February 1968)

### Work Experience Last 10 Years

- 1957-1960 Exams Clerk, NYS Department of Civil Service, Albany New York
- 1960-1962 Correction Officer, Sing Sing Prison, Ossining, New York
- 1962-1965 Correction Officer NYSVI, Coxsackie, New York
- 1965 Appointed Director of NYS Correction Academy, Beacon, New York
- 1967 Appointed Sergeant (Still in charge of Correction Academy)

Work Experience Last 10 Years Cont'd.

- 1970 Appointed Lieutenant at Great Meadow Prison, Comstock, New York
- 1971 Appointed Uniformed Labor Relations Representative, December 1971 (Central office - Albany, New York)
- 1972 Appointed Captain in charge of All Uniformed Training in the Department of Correctional Services
- October, 1972 - present - On leave of absence from Department of Correctional Services, Director of Minority Recruitment and Community Relations for the New York State Police

Duties of Training Position

Under the direction of the Director of Staff Development, Department of Correctional Services, it was my responsibility to develop instructional training programs, select and train teaching personnel, develop instructional manuals, cooperate with other agencies in training and educational matters, make arrangements for physical facilities and equipment for training sessions, establish control records, and prepare and review reports. I was also responsible for coordinating the Scholarship Aid Program for my Department in addition to making appropriate changes in policy and procedure for this program.

In 1965 I was assigned the task of developing a centralized training academy program for all newly appointed Correction Officers in this Department. This was accomplished and the first three (3) week session began in November 1965. As Director of the Academy I was full time resident official in charge. It was my responsibility to coordinate, evaluate, develop new course content as well as revise, add or delete to the program as the need arose. I was responsible for approximately forty (40) professional and non-professional staff personnel from various State agencies. I also acted as a substitute instructor when regularly scheduled staff members could not participate. All students attending the Academy were under my direct supervision and I was responsible for their attendance, feeding, housing and general conduct. Each student completing the program was evaluated by me with recommendations sent to his institution for further evaluation. Since the inception of this program approximately seven and one-half years ago, some 3,000 officers have been processed through the Academy.

Duties as Labor Relations Representative

As Labor Relations Representative for the Department of Correctional Services, I was responsible for representing the Commissioner at all third stage grievance proceedings. In the course of my duties, it was necessary for me to visit many institutions throughout the state on a regular basis in order to appear for the Commissioner. My duties also required a familiarity with all departmental procedures and the duties of all uniformed personnel.

Teaching Experience

- Have been on staff and Planning Committee of Moran Institute Conference on Crime and Delinquency at St. Lawrence University, Canton, New York (one-week program) the following years:

1965 - 1966 - 1967 - 1968 - 1969 - 1970

- Have lectured to various groups on crime and delinquency for teachers, civic groups, colleges, etc.

Military Experience

- Korean War Veteran - on Active duty with U.S. Air Force from November 1950-November 1953
- Rank attained A/1C
- Duties: Combat Military Policeman
- Inactive Reserve 1953-1958

Professional Organizations and Committees

- National Conference on Crime and Delinquency
- NYS Interdepartmental Committee on Youth
- NYS Interdepartmental Committee on Safety
- American Correctional Association
- United Prison Association
- Middle Atlantic States Conference on Correction

David R. Harris

Resume

Page 4

Professional Organizations and Committees Cont'd.

- State Board, Education Committee, CSEA
- President--Department of Correction Chapter, CSEA, (1968)
- Statewide Labor Relations Representative (AFSME-Council 82) (1970-1971)

Civil Involvement

- Member: American Legion, VFW and 369th Veterans Association
- Member: PTA, Hackett Junior High School, Albany, New York
- Member: Fathers Association, St. Agnes School Loudonville, New York
- Member: NAACP and National Urban League
- Ran for member of first Elected School Board in Albany, New York (1971)
- Active volunteer participant in many other community programs in my community

Special Awards

- Commendation for valor in line of duty -- Dr. Glenn M. Kendall, Superintendent, NYS Vocational Institution, West Coxsackie, New York, March 16, 1965
- Commendation for valor in line of duty -- Commissioner of Correction, Paul D. McGinnis, March 26, 1965
- Was designated by Governor Nelson A. Rockefeller as delegate to represent New York State at the 97th Annual Congress of the American Correctional Association at Miami Beach, Florida, from August 20 through August 24, 1967
- Supervisor of year -- Coxsackie Correctional Facility, 1970

David R. Harris  
Resume  
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Travel

- Traveled in all sections of the United States excluding Hawaii and Alaska
- Traveled in Canada and Mexico

Personal Data

- Born in Oneonta, Nw York, August 30, 1929
- Married--one child--Lisa Marie (9 years old)
- Health--excellent

Present Position

Upon request by William E. Kirwan, Superintendent of the New York State Police, to take a leave of absence from the Department of Correctional Services to accept an administrative position in the New York State Police. I accepted and was named Supervisor of Minority Manpower Programs for the Division of New York State Police.

Since assuming this position I was responsible for a statewide minority recruitment drive for Black, Hispanic and other minority candidates to enter the Division of State Police. The second part of this program was to establish a community relations program mainly in the urban areas and inner-cities throughout this State.

RESUME

NORMA L. KUNOFSKY

CHIEF PERSONNEL EXAMINER

EDUCATION

1944 City College of New York  
1949 City College of New York  
1944 to date

BBA Major - government  
MBA Major - government  
Miscellaneous courses at New York University,  
New School of Social Research, State  
University in such areas as: public  
administration, tests and measurements,  
creative writing, statistics

EXPERIENCE

New York State Department of Civil Service

12/1/49	Personnel Technician (Examinations)
4/16/53	Senior Personnel Technician (Examinations)
3/9/61	Associate Personnel Technician (Examinations) (title changed to Associate Personnel Examiner)
4/6/64	Principal Personnel Examiner
5/11/67	Chief Personnel Examiner

My experience with the Department of Civil Service has been in the examining program. At various times I have been responsible as a Personnel Technician and Senior Personnel Technician for specific testing assignments; as a Senior Personnel Technician for field work in inspecting examination centers and training local supervisors in test administration, and for high school and college recruiting; as an Associate Personnel Examiner for the supervision of a unit of Examiners responsible for tests in a specific field (1) social welfare, (2) cross-occupational skills; as Principal and Chief Personnel Examiner, for the direction of the section responsible for aptitude tests, cross-occupational tests, and verbal skills tests.

During 1948-49 I was called on an "as needed" basis to do substitute teaching in the Government Department at City College of New York. I taught classes in government with an emphasis on public administration.

PROFESSIONAL SOCIETIES

Member of local and national chapters of American Society for Public Administration and International Personnel Management Association.

Member of National Council on Measurement in Education

Held office with Albany District Chapter, Public Personnel Association as follows:

1961-62	Secretary
1966-67	Vice President
1967-68	President

Norma L. Kunofsky

RESUME

KATHARINE B. TANG

ASSOCIATE PERSONNEL EXAMINER

EDUCATION

September 1960 - June 1963	Linton High School
September 1963 - June 1965	Skidmore College
September 1965 - June 1967	New York University (Washington Square College)

Degree: BA

Major - English

In college, in addition to a required 3 hour course in English composition, I took two elective writing seminars.

EXPERIENCE

June 1967 - New York State Department of Civil Service

Titles:

June 1967 - August 1967	Administrative Trainee
September 1967 - September 1968	Personnel Examiner
October 1968 - October 1970	Senior Personnel Examiner
November 1970 -	Associate Personnel Examiner

My experience with the Department of Civil Service has been in the testing program, in the section responsible for aptitude, cross-occupational, and verbal skills tests. From June 1967 to June 1969 I worked in the unit responsible for aptitude tests. From May 1968 on, I supervised an Administrative Trainee who worked in the unit. During the period I worked in this unit, I was given intensive on job training in writing and editing test questions, with major emphasis on questions in the verbal skills area.

In May 1969 the section was reorganized, and a Verbal Skills Unit was created; I was appointed Acting Unit Head. I have run the unit ever since, becoming its "permanent" head in November 1970, when I was appointed Associate Personnel Examiner.

FORMAL TRAINING

While working for the Department of Civil Service, I have attended department training courses on report preparation and on supervision, bureau training courses on statistical concepts and on item construction, and an IPMA workshop on validation.

PROFESSIONAL SOCIETIES

Public Personnel Association

8/10/73

RESUMEJOHN S. DECKERASSOCIATE PERSONNEL EXAMINEREDUCATION

Sept. 1958 - June 1962

Lafayette College, Easton, Pa.

BA - Psychology

Aug. 1964 - to date

Courses presented by the Dept. of Civil Service--Report and Letter Writing--Exams Orientation--Item writing--Effective Executive Supervision

EXPERIENCE

Aug. '64 - Jan. '67

Personnel Examiner--Research and Quality Control Section (Examinations--D. of G.S.)

Feb. '67 - Jan. '68

Sr. Personnel Examiner--Aptitude, Cross-Occupational and Verbal Skills Section (Examinations--D. of C.S.)

Feb. '68 - Apr. '68

Research Analyst--Research and Statistics Section (Dept. of Social Services)

May '68 - July '69

Sr. License Examinations Technician--Examinations Section (Dept. of State)

Aug. '69 - Oct. '71

Sr. Personnel Examiner--Law Enforcement Unit (Examinations--Dept. of C.S.)

Nov. '71 - present

Associate Personnel Examiner--Cross-Occupational Unit (Examinations--Dept. of C.S.)

My initial testing experience was as an undergraduate Psychology major at Lafayette College. I took several testing and measurement courses in meeting the requirements for a BA degree. My experience as a Personnel Examiner (Aug. '64 - Jan. '67) in the Test Development Bureau of Civil Service dealt with quality control and included, as well, participation in experimental test construction and analysis. As a Sr. Personnel Examiner (Feb. '67 - Jan. '68) my work concerned aptitude testing for various competitive entrance level positions. My experience with the Department of State (May '68 - July '69) involved the construction, administration and analysis of examinations required of individuals wishing to be licensed as a real estate broker-salesman, notary public, cosmetologist, barber and private detective. As a Sr. Personnel Examiner in the Law Enforcement Unit of the Department of Civil Service's Test Development Bureau I participated in the construction of examinations for various law enforcement and investigatory positions. Since November of 1971 I have been head of the Cross-Occupational Unit which is responsible for the development of examination materials in such areas as supervision and administration.

My undergraduate academic background most pertinent to my present position has been in the areas of behavioral psychology and personnel administration. Formal courses in behavioral psychology dealt with Elements of Psychology (Perception, Motivation and Emotion, Adaptive Behavior / Problem Solving, Learning, Language, Psychological Measurement, Intelligence and Ability, Heredity and Environment, Growth and Development, Personality, Conflict and Adjustment), Experimental Psychology (Discriminal Processes, Motivation,

Frustration, Conflict, Transfer of Training, Conditioning, Thinking, Forgetting-Retention), Analysis of Behavior (Reflex Behavior, Operant Conditioning [positive and negative reinforcement], Shaping, Intermittent Reinforcement, Stimulus Control, Deprivation, Emotion, Avoidance and Escape Behavior, Punishment, Self Control, Interpretation of Personality), Personality and Psychotherapy (Basic Principles of Learning, The Normal Use of the Mind in solving emotional problems, Conflict Therapy). My studies in Personnel Administration were related to Management, The Individual in the Organization, Diagnosing Organizational Health, Developing and Utilizing Human Resources, Remunerating Human Resources, Employer Benefits and Services.

In the management positions I have held for New York State I have worked directly under several supervisors. This has afforded an opportunity to observe first-hand the application and results of various supervisory techniques. Since November of 1971, as unit head of the Cross-Occupational Unit, I have supervised a staff of Personnel Examiners and have been directly supervised by Mrs. Norma Kunofsky, Chief Personnel Examiner (Nov. '71 - Aug. '72) and Mr. James Beninati, Principal Personnel Examiner (Aug. '72 - present). Unit production, after my review, is further reviewed by my supervisor. Mrs. Kunofsky's resumé has been submitted. Mr. Beninati holds a Bachelor's Degree in Management Engineering and has served as an instructor in courses dealing with supervisory practices.

John S. Decker

1. Entering paper packages of clothes	104	99	9	12	9	9	15	9	8	6	2	10	6	6	4
2. Facility Co's on duty	104	99	9	12	9	9	15	9	8	6	2	10	6	6	4
3. Supervising unclassified employees	59	56	6	4	1	2	15	4	7	2	1	9	1	7	5
4. Preventing disturbances/escapes	49	47	7	0	6	6	15	0	5	2	2	3	1	2	1
5. Referring inmate needs to appropriate authority	66	63	6	8	4	5	15	3	1	3	2	10	1	8	7
6. Knowing types of sentences and inmate classification	5	5	0	0	2	0	0	2	0	0	1	0	0	0	0
7. Assigning Co's to posts of duty	19	18	2	2	5	2	0	1	0	1	2	2	2	0	0
8. Working towards to oversee security and sanitary, security procedures	99	10	12	9	9	15	9	8	6	1	10	6	9	7	8
9. Participating in inmate rehabilitation	63	60	3	7	4	5	15	4	1	3	2	10	1	8	7
10. Overseeing needs/general maintenance of inmates	94	10	12	7	9	15	9	8	6	1	10	5	6	1	10

## Appendix 2

parsons, courts, etc.

12. Acting as second in command under Lt. on night shift	19	18	0	1	2	2	0	2	2	2	1	3	2	2
13. Supervision *	105	100	12	9	9	15	9	8	6	2	10	6	9	4
14. Report preparation	58	55	8	9	7	1	0	9	2	3	2	10	3	4
15. Conducts morning musters	4	4	2	2	1	0	0	0	1	0	0	0	1	0
16. Sets up adjustment committee	2	2	1	1	0	0	0	0	0	0	0	0	0	0
17. Works with Sgt. in Sept. procedure	1	1	1	1	0	0	0	0	0	0	0	0	0	0
18. Makes recommendations to several units	1	1	1	1	0	0	0	0	0	0	0	0	0	0
19. Publishes bimonthly newspaper	2	2	1	1	0	0	0	0	0	0	0	0	0	0
20. Checks morale, finds out daily	1	1	1	1	0	0	0	0	0	0	0	0	0	0
21. Prepares bi-monthly mess schedules	1	1	0	1	0	0	0	0	0	0	0	0	0	0
22. Supervises cleaning of colored carpet	1	1	0	0	1	0	0	0	0	0	0	0	0	0
23. Checks cleaning of kitchenware, supplies, etc.	8	8	0	1	1	0	0	0	0	0	0	0	0	0
24. Takes notes during court & hearing	1	1	0	0	0	0	0	0	0	0	0	0	0	0
25. Sets up and holds trials	1	1	0	0	0	0	0	0	0	0	0	0	0	0
26. Prep. charters for future periods	1	1	0	0	0	0	0	0	0	0	0	0	0	0
27. Prep. bimonthly news	105	105	10	12	9	4	15	9	8	6	2	10	6	9

Appendix 2.

NOTE

Classification of Job Tasks Appearing  
on Duties Statements with 14 Job Tasks  
Appearing on Subtest Descriptions

1. Enforcing proper performance of duties -

- a) Check with men assigned to outside patrol to see that all zones are continually being checked (Wallkill-Post 1-Task 2)
- b) See that officers are on their ~~assigned~~ posts when inmates return to blocks after meals (Elmira-Cell Block Sgt.-Task 9)
- c) Supervises officers working in kitchen and makes sure that count is taken properly and accurately (Ossining-Post 1)

2. Advising Correction Officers on duty -

- a) Instructs officers in their duties and inform them of any charges in the laws, rules and policies effecting their duties (Clinton-Post 2-Task 3)
- b) Holds interviews with inmates in shop and school areas and discuss any problems with staff (Coxsackie-Shops & School-Task 5)
- c) During the above rounds, I talk to all residents assigned to and admitted to the hospital as well as all of the officers assigned to me. All problems, real or imagined, are aired and the process of solving them is started (Woodbourne-Post 3-Task 5)

3. Cooperating with non-custodial employees -

- a) He shall, with the Recreation Supervisor, coordinate all athletic and sports events (Eastern-Recreation Yard)
- b) Acts as liaison between industrial foremen, teachers and other civilian industrial employees and the custodial force (Clinton 2-Task 4)
- c) Assist the doctors and nurses especially with mental observation inmates (Greenhaven-Special Housing Unit-Task 8)

4. Preventing disturbances and escapes -

- a) Determine that correct and proper security is maintained in all areas under supervision (Great Meadow-Post 4-Task 4)
- b) Collaborates with farm sergeant on escape plans and procedure (Greenhave-Admin Bldg-Task 6)
- c) See that safety and security measures are adequate and adhered to (Wallkill-Post 1-Task 7)

5. Referring inmate needs to appropriate authority -

- a) Insure proper recreation program is set up for the inmate population (Ossining-Post 7)
- b) See residents are taken to hospital for medical treatment if needed (Woodbourne-Post 6-Task 8)
- c) He shall visit all gangs daily and constantly check on the welfare of the inmates (Eastern-Post 6)

6. Knowing types of sentences and inmate classification -

- a) Conduct orientation and pre-parole classes for inmates (Great Meadow-Post 7)
- b) Does the initial interviews of all new state inmates and completes required interview forms (Ossining-Post 5)
- c) Check Rolodex cards at A Block Control and note escape risks, emotionally unstable, etc. (Reception Center-Transportation Sgt.-Task 3)

7. Assigning Correction Officers to posts of duty -

- a) He must assign officers to guard posts in the yard maintaining proper coverage at all times (Auburn-Post 1-Task 1)
- b) Assign miscellaneous officers to various assignments (Coxsackie-Duty Sgt.-Task 4)
- c) Responsible for making all unscheduled correction officer assignments and meeting the demands for Correction Officers throughout the facility from 3:00 P.M. to 5:45 P.M. (Clinton-Post 7-Task 7)

8. Making rounds to oversee security, sanitary and safety procedures -

- a) Supervision of wall posts, front gate, lock gates, outside gangs and outside adjacent areas (Attica-Post 4-Task 2)
- b) It is the duty of this Sergeant to make a tour through the shops in the morning and afternoon to see that all officers assigned are performing their duties in the prescribed manner, resolves any problems which may arise which can be handled at his level (Auburn-Post 7-Task 3)
- c) Make tours of facility at irregular intervals to check security especially in hospital area in the West Yard (Elmira-Post 7-Task 2)

9. Participating in inmate rehabilitation -

- a) Counseling for residents in C-1 (Woodbourne-Block Sgt.-Task 4)
- b) Hold interviews with inmates in shop and school areas and discuss any problems with staff (Coxsackie-Shops & School-Task 5)
- c) Counseling of inmates in segregation (Greenhaven-Special Housing-Task 9)

10. Overseeing meals/general movement of inmates -

- a) He shall directly supervise any large gatherings in a recreation area, movies, gym or mess halls (Eastern-Post 1)
- b) It is the duty of this Sergeant to supervise the movement of inmates from housing blocks to the hospital when the need arises during his tour of duty (Auburn-Post 8-Task 8)
- c) See that orderly flow of inmates is maintained when passing out through Center Gate to shops, schools, hospital, field house & ball park (Elmira-Post 6-Task 6)

11. Escorting prisoners to other prisons, courts, etc. -

- a) Deliver draft to receiving institution per their established procedure (Reception Center-Transportation Sgt.-Task 5)
- b) Act as OIC when conducting inmates on trips outside the institution on sick visits, death visits, court appearances or other details (Great Meadow-Post 9-Task 8)

12. Acting as second in command under Lieutenant on night shift -

- a) Check and verify counts with the Lieutenant in charge (Wallkill-Post 5-Task 5)
- b) Works in conjunction with the Lt. in charge of the 4:00 P.M. - 12:00 P.M. shift (Ossining-Post 9)
- c) It is the duty of this Sergeant to assist the Watch Commander in seeing that the custody and security of the facility and general well being of the inmates is adhered to (Auburn-Post 8-Task 1)

13. Supervision -

- a) Supervision of C Block, C Recreation Yard & outside adjacent areas (Attica-Post 3-Task 2)
- b) In charge of security and correction officers in these areas (Elmira-Post 3-Task 1)
- c) Supervise gym area officers in the recreation program (Woodbourne-Post 6-Task 6)

14. Report preparation -

- a) Maintains accurate, up to date files on all inmates and yard counts (Clinton-Post 7-Task 12)
- b) Investigate and report on complaints by inmates (Great Meadow-Post 5- Task 1)
- c) Complete log and reports on any incidents during tour of duty (Coxsackie-Post 8 Sgt.-Task 7)



STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK )

Janet Portelly , being duly sworn, deposes and  
says that she is employed in the office of the Attorney  
General of the State of New York, attorney for Defendants-Appellants  
herein. on the 18th day of March , 1975 , she served  
the annexed upon the following named persons :

Sneeringer & Rowley  
90 State Street  
Albany, New York 12207

Deborah M. Greenberg, Esq.  
Morris Baller, Esq.  
10 Columbus Circle  
New York, New York 10019

Attorney in the within entitled appeal by depositing  
a true and correct copy thereof, properly enclosed in a post-  
paid wrapper, in a post-office box regularly maintained by the  
Government of the United States at Two World Trade Center,  
New York, New York 10047, directed to said Attorney at the  
address eswithin the State designated by them for that  
purpose.

Janet Portelly

Sworn to before me this  
18 day of March , 1975

S. K. Portelly  
Assistant Attorney General  
of the State of New York